BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Improving Public Safety	)	
Communications in the 800 MHz Band	)	
	)	**WT Docket No. 02-55**
Consolidating the 900 MHz Industrial/	)	
Land Transportation and Business Pool	)	
Channels	)	
	)	
Wireless Telecommunications Bureau	)	
Seeks Comment on "Supplemental	)	
Comments of the Consensus Parties"	)	**DA 03-19**
Filed in the 800 MHz Public Safety	)	
Interference Proceeding	)	

To: The Wireless Telecommunications Bureau

SUPPLEMENTAL COMMENTS OF CINERGY CORPORATION

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EXECUTIVE SUMMARY

Cinergy Corporation, a multi-state gas and electric utility licensed in the 800 MHz band, urges the Federal Communications Commission ("FCC") not to succumb to the pressure of the so-called Consensus Parties. Despite the highly touted improvements to the Consensus Plan in the Supplemental Comments, this realignment proposal remains fundamentally flawed.

The Consensus Parties invite the FCC to accept or reject the Plan in its entirety, and Cinergy believes that the FCC should accept this offer and reject the Plan. The Consensus Plan is a self-serving approach, laden with special interest benefits, that would impair the operations of incumbent licensees and have a questionable impact on Public Safety interference. While the Consensus Parties have attempted to force the FCC to settle for this imperfect and convoluted realignment by issuing an "all-or-nothing" ultimatum, the FCC should not yield to this strategy but instead should compel Nextel to comply with the universally applicable technical, operational, and interference mitigation rules. In addition, the Plan ignores the FCC's policy of practicing technical and market-based interference resolution as well as its consistent protection of innocent incumbent licensees' rights during prior realignments.

Although characterized as a solution to the 800 MHz interference problem, the Consensus Plan Supplement ironically reveals the disastrous impact of this realignment proposal on Critical Infrastructure Industries, such as Cinergy, and other unfortunate incumbent licensees. In particular, the incorporation of a Guard Band and multiple licensing freezes impose unrealistic and unjustifiable conditions on licensees. The Guard Band proposal would relegate a substantial portion of Cinergy's land mobile system to

interference-prone spectrum, while simultaneously disenfranchising it of over 90% of its existing protected service area. In this and other regards, the proposal would treat Cinergy and other Critical Infrastructure Industry licensees differently from Public Safety licensees, even though they share a common mission of protecting the public and intercommunicating during emergencies. In addition to operating in this interference-prone spectrum, the Consensus Plan would also require Cinergy to conform its perfectly compliant system to a set of restrictive standards. Despite the rampant interference caused by Nextel's operations, and the historic location of Guard Bands in spectrum allocated to interference-causing entities, Nextel would escape any such technical or operational restrictions.

The proposed licensing freezes would further burden Critical Infrastructure Industry licensees, such as Cinergy, by preventing them from expanding or modifying their systems. Although these systems require continual adjustment to ensure safe and efficient delivery of gas and electricity, the freeze would preclude any licensing activities for several years while expanding access to scarce Business and I/LT Service channels. These go beyond what is necessary to any policy objective expressly stated in the Consensus Plan, which implies that Nextel would vacate more than enough spectrum to complete Public Safety relocation. While the freeze serves no purpose articulated in the Plan itself, this measure illuminates how the "Consensus Parties" are entirely unrepresentative of 800 MHz licensees.

In addition to these unjustifiable restrictions on innocent incumbent licensees, certain aspects of the Consensus Plan Supplement are patently unlawful. The attempted delegation of policymaking authority to the Regional Coordination Committee ("RCC")

violates at least three different statutes as well as the U.S. Constitution. The Government Corporation Control Act prohibits the FCC from creating or causing the creation of any corporation, such as the RCC, to implement governmental policies. Even in the unlikely event that the RCC were not to violate this statute, the proposed delegation of FCC power to a private party would still conflict with the FCC's limited authority to delegate policymaking functions under the Communications Act of 1934, as amended. The FCC could not cure these problems by authorizing the RCC to act as an advisory committee under the Federal Advisory Committee Act because the delegation of policymaking functions and composition of the RCC contravene basic tenets of that statute. The composition of the RCC would also violate the Due Process Clause of the Fifth Amendment.

These problems are compounded by the failure to provide any enforceable rights for incumbent licensees, despite similar protections in other band realignments. For example, the proposed relocation procedures require the submission of extensive proprietary information, even though this information is crucial to national security and unnecessary for the development of a relocation plan. The Consensus Plan also prohibits or restricts the deployment of advanced systems in direct conflict with the public interest and the FCC's long-standing policy in favor of flexible spectrum use and innovative technologies. Although the proposed rules offer incumbent licensees the right to negotiate and arbitrate the relocation of their systems, these rules incorporate certain built-in limitations that render those rights virtually meaningless.

The Consensus Plan also fails to provide the funding essential to ensure the completion of the proposed 800 MHz realignment. Despite its negligent interference-

causing operations, Nextel attempts to cap its liability. The arbitrary funding limitation risks the premature depletion of the fund, which would result in a partially completed realignment with Nextel's unmodified interference-causing operations situated co-channel with the NPSPAC systems in some regions. The proposed rules also fail to offer sufficient security for the relocation fund. The use of separate corporate entities and the authority to control the collateral would permit Nextel to evade all responsibility for funding the relocation, leaving incumbent licensees in utter ruin.

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SUPPLEMENTAL COMMENTS OF CINERGY CORPORATION

Cinergy Corporation ("Cinergy"), by and through its undersigned counsel, submits these Supplemental Comments in the above-captioned docket. In this proceeding, the FCC requested comment on methods by which it could alleviate harmful interference to 800 MHz Public Safety systems while limiting disruption to incumbent licensees.[1] These Supplemental Comments respond to the Wireless Telecommunications Bureau's *Public Notice* seeking comment on the Supplemental Comments filed by the signatories to the so-called Consensus Plan in that docket.[2]

[1] In re Improving Public Safety Communications in the 800 MHz Band; Consolidating the 900 MHz Industrial/Land Transportation and Business Pool Channels; WT Docket No. 02-55, *Notice of Proposed Rule Making*, 17 F.C.C.R. 4873 (2002).

[2] Wireless Telecommunications Bureau Seeks Comments on "Supplemental Comments of the Consensus Parties" Filed in the 800 MHz Public Safety Interference Proceeding, WT Docket No. 02-55, *Public Notice*, DA 03-19 (Jan. 3, 2003). On January 16, 2003, the Wireless

I. INTRODUCTION

As one of the largest diversified energy companies in the United States, Cinergy provides electric and gas service to millions of customers in Ohio, Indiana, and Kentucky. To facilitate its internal communications and to monitor its power generation and distribution systems, Cinergy operates extensive private land mobile communications systems in the 800 MHz band.[3] Because of the critical importance of these communications systems to its Critical Infrastructure Industry activities, Cinergy has taken an active interest in this proceeding from its inception and has filed Comments,[4] Reply Comments,[5] and Further Comments[6] detailing its views.

In particular, Cinergy has consistently recommended that the FCC conduct further investigation into the source and the scope of the interference problem. After the FCC better understands the nature and extent of the problem, it could implement technical and market-based solutions in accordance with its existing interference mitigation rules and, if rebanding is necessary, with its relocation rules for the 2 GHz band and the upper 200 SMR channels in the 800 MHz band. Despite the call for a reasoned and deliberate approach, the Consensus Parties

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Telecommunications Bureau extended the filing deadlines for comments and reply comments by one week each. In re Improving Public Safety Communications in the 800 MHz Band, WT Docket No. 02-55, *Order Extending Time for Filing of Comments*, DA 03-163 (Jan. 16, 2003).

[3] Cinergy is the parent company of Cincinnati Gas & Electric ("Cinergy CG&E") and PSI Energy, Inc. ("Cinergy PSI"). Each of these subsidiaries operates a private land mobile communications system in the 800 MHz band. Cinergy PSI operates a conventional system exclusively on General Category frequencies and has licensed an additional 63 Business and Industrial/Land Transportation frequencies, including some frequencies in the proposed Guard Band, for a digital iDEN system. Cinergy CG&E operates conventional and trunked systems on sixteen Business and Industrial/Land Transportation frequencies, including four in the proposed Guard Band.

[4] Comments of Cinergy Corporation, WT Docket No. 02-55 (May 6, 2002).

[5] Reply Comments of Cinergy Corporation, WT Docket No. 02-55 (Aug. 7, 2002).

[6] Further Comments of Cinergy Corporation, WT Docket No. 02-55 (Sept. 23, 2002).

continue to seek a sweeping and convoluted realignment plan that would wreak havoc on incumbent licensees and provide disproportionate benefit for a select few.

Although presented as an improvement on the initial proposal, the most recent version of the Consensus Plan would still have a devastating effect on Cinergy's communications systems. The proposed rules would require the relocation of all General Category licensees to a Guard Band, where they will receive conditional or diminished interference protection. Because Cinergy PSI operates exclusively on General Category channels, it would have to reprogram every single base station and mobile unit in its 22,000 square mile service area individually. In addition, several of Cinergy CG&E's Business and I/LT frequencies currently fall within the proposed Guard Band, meaning that they would also suffer an increase in interference. Even those Cinergy CG&E frequencies that do not fall within the proposed Guard Band would lose significant portions of their protected service areas because of the more stringent, and unattainable, technical restrictions.

In addition to the potential costs and disruptions caused by the relocation, the proposed rules also threaten Cinergy's future operations. The Consensus Plan would permanently foreclose any further expansion of Cinergy's communications systems by imposing a freeze on the licensing of Business and I/LT spectrum and opening this spectrum to other licensees. The Consensus Plan could also preclude Cinergy's planned implementation of a new iDEN system because of the prohibition on cellular systems. Cinergy had formulated plans and acquired frequencies for this new iDEN system only to have the Nextel White Paper introduce complete chaos to the entire 800 MHz band. Upon the initiation of this 800 MHz proceeding, Cinergy immediately ceased the deployment of this new iDEN system and will be unable to upgrade its network until the FCC restores regulatory stability to this band.

Finally, as a Critical Infrastructure Industry, Cinergy and the citizens in its service area should not have to suffer the devastating effect on their safety wrought by the Consensus Plan. Critical Infrastructure Industries should receive the same preferential treatment as Public Safety licensees under any proposed realignment plan because they use their communications systems for similar functions and require the ability to intercommunicate in times of emergency. Cinergy's wireless communications systems are also fundamental to protecting its employees, who work under hazardous conditions on a daily basis to ensure the continued operation of gas and electric transmission and distribution systems that affect the lives of virtually everyone within Cinergy's service area. Thus, the FCC must take measures to guarantee that utilities are able to continue their operations by ensuring that they receive the same protections as Public Safety licensees.

II. THE FCC SHOULD NOT ADOPT THE CONSENSUS PLAN AS CURRENTLY PROPOSED

A. The Numerous Problems with the "All-or-Nothing" Consensus Plan Preclude Its Adoption

The Consensus Plan represents an attempt by its signatories to exercise inappropriate influence over the FCC's management of the radio spectrum. These signatories require the FCC to adopt the Plan *exactly* as formulated because "[a]ny material modification of the Consensus Plan would eliminate the voluntary commitments of and cooperation among the affected licensees indispensable to its successful and expeditious implementation."[7]

The FCC should not yield to this "all-or-nothing" demand by the signatories to the Consensus Plan. Nextel conditions its willingness to remedy interference caused by its

[7] Supplemental Comments of the Consensus Parties, WT Docket No. 02-55 at 4 (Dec. 24, 2002) [hereinafter *Consensus Plan Supplement*].

operations on the grant of 10 MHz of nationwide, contiguous spectrum.[8] The other signatories clearly stand to benefit from the proposal as well. While parties are obviously free to advance positions before the FCC to benefit themselves, the FCC should not be *forced* into accepting their bargain. The "all-or-nothing" proposition attempts to exert undue pressure on the FCC to adopt the plan as formulated or risk losing Nextel's "voluntary" offer to remedy a problem for which it is primarily responsible.

In addition, a dramatic number of parties have voiced strong opposition to the Consensus Plan and, most significantly, the Plan does not reflect the views of many *licensees* in the 800 MHz band. While the Consensus Parties note that "[t]he Consensus Plan is the only proposal before the Commissions that enjoys the support of organizations representing over 90 percent of the 800 MHz Land Mobile Radio licensees affected by CMRS – public safety interference,"[9] "organizations" is the operative word. Nextel has obtained the support of several trade associations but, significantly, it has not secured the approval of a large number of their constituents, who hold the actual licenses. Particularly notable in this proceeding is the fact that hundreds of individual licensees filed comments, *including many public safety licensees,* expressing divergent positions, often differing from the positions taken by their national trade organizations.

Moreover, the Consensus Plan lacks the support of electric and gas utilities, which comprise a significant portion of the licensees in the 800 MHz band. Nextel also apparently failed to acquire the formal approval of its affiliate Nextel Partners, Inc. ("NPI"), even though

[8] *Id.* at 4 n.6. Cinergy assumes that the *Consensus Plan Supplement* does not include the numerous additional conditions that Nextel attempted to impose on the adoption of the Plan, such as the resolution of all administrative and judicial appeals within two years of the Report and Order and the sunset rules on its contribution. Reply Comments of Nextel, WT Docket 02-55, 31-32 (Aug. 7, 2002).

Nextel has pledged NPI's spectrum and cooperation in the Plan. The Wireless Telecommunications Bureau has rightly noted that the term "consensus" "merely denotes that the signatories have reached consensus in the contents of their filing. *The filing does not represent a consensus reached by all parties . . . .*"[10]

Finally, the FCC should decline to adopt the "all-or-nothing" Plan because it fails to remedy many of the problems identified by commenters during earlier stages of this proceeding and even creates additional legal and practical problems. Cinergy discusses the shortcomings of the most recent version of the Consensus Plan throughout these Supplemental Comments.

B. The FCC Should Immediately Adopt a Best Practices Procedure and Implement Technical and Market-Based Procedures to Remedy the Interference Problems in the 800 MHz Band

As discussed in detail below, the Consensus Parties' realignment proposal is an unwieldy, self-serving approach with a questionable positive impact on Public Safety interference. The FCC has available a less costly and disruptive alternative to realignment to remedy interference in both the short and long terms. Specifically, requiring the use of the previously developed "Best Practices Guide"[11] and adopting reinforced interference resolution rules that establish clear procedures and obligations would have an immediate beneficial effect. Cinergy believes that the FCC could employ market-based transactions that are consistent with existing regulatory authority and precedent, without prejudice to the implementation of a rebanding proposal should the FCC ultimately deem one to be appropriate.

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[9] *Consensus Plan Supplement* at 3.

[10] Wireless Telecommunications Bureau Seeks Comments on "Supplemental Comments of the Consensus Parties" Filed in the 800 MHz Public Safety Interference Proceeding, WT Docket No. 02-55, *Public Notice*, DA 03-19 n.3 (Jan. 3, 2003) (emphasis added).

In this regard, Cinergy endorses a set of simple rules, attached hereto as Appendix A, that could provide an almost immediately available avenue for redress and begin to resolve this serious problem. This approach would engender proactive solutions to interference experienced by Public Safety and other incumbent licensees while also providing a more efficient and effective solution to the interference problem than the convoluted and unlawful realignment approach offered by the Consensus Plan. The signatories to the Consensus Plan concede that the proposed realignment of the 800 MHz band would not eliminate the interference problem. Indeed, the extent to which the proposed realignment will reduce interference remains unclear relative to other measures endorsed by the Consensus Parties. Cinergy therefore continues to believe that, at a minimum, the FCC should first implement rules to govern interference mitigation.

While Cinergy believes such an approach represents the most reasonable and legally valid long term approach to Public Safety interference set forth in this proceeding, Cinergy recognizes that the FCC must consider all of the proposals. In the event that the FCC ultimately determines that rebanding is appropriate, Cinergy urges the FCC to adopt a much more balanced format for relocation than that put forth by the Consensus Parties. Cinergy has attached hereto as Appendix B a set of model rules to govern rebanding relocation. Substantial FCC precedent exists for this type of approach, including the recent proceedings to relocate licensees from the 800 MHz Upper 200 SMR channels and the 2 GHz bands.[12] Furthermore, Cinergy submits that the earlier relocation of incumbents from those bands was orderly, efficient, and relatively free of serious legal disputes because of the inherent fairness of this type of approach. In contrast, the

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[11] Avoiding Interference between Public Safety Wireless Communications Systems and Commercial Wireless Communications Systems at 800 MHz: A Best Practices Guide (Dec. 2000).

Consensus Parties' proposal is virtually certain to generate significant legal opposition at all levels.

III. THE GUARD BAND IS UNACCEPTABLE FOR CRITICAL INFRASTRUCTURE INDUSTRY COMMUNICATIONS SYSTEMS

A. The Guard Band Imposes Ill-Advised Technical Restrictions that Reduce the Interference Protection for Incumbent Licensees

Although Nextel has previously stated that it will be better able to manage intermodulation interference if it is assigned a nationwide, contiguous block of spectrum,[13] the Consensus Parties now forego imposing such a management requirement on Nextel and instead propose to authorize Nextel to interfere more freely with systems licensed in the so-called "Guard Band" spectrum.

If the FCC decides to implement a Guard Band, it should not impose additional technical restrictions on incumbent Public Safety, Business, I/LT, and high-site SMR licensees. The Consensus Plan proposes heightened thresholds for signal strength that vary based on the separation between the licensee's frequency and 816/861 MHz, the lower edge of the "cellularized" band.[14] The threshold signal strength for interference protection would start at -98 dBm, or -95 dBm for new systems, at 859 MHz and would increase to -92/-89 dBm at 859.5 MHz and to -59/-56 dBm at 860.5 through 861 MHz. Under these thresholds, incumbent licensees would lose large swaths of their protected service areas and would be subject to harmful interference without recourse.[15]

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[12] 47 C.F.R. §§ 90.699, 101.69-101.81 (2001).

[13] Reply Comments of Nextel Communications, Inc. WT Docket No. 02-55, Appendix II at 3 (Aug. 7, 2002).

[14] *Consensus Plan Supplement* at 41-42, App. F.

[15] *Id.*

These technical restrictions would be impossible to implement in many cases because the spectrum is already highly congested, with incumbent licensees having secured the maximum available power levels. Cinergy does not currently receive a signal throughout its service areas that would meet the increased thresholds for the Guard Band. As an incumbent in the General Category portion of the 800 MHz band, the existing rules on co-channel separations would actually preclude Cinergy PSI from meeting these thresholds without constructing many more base stations at great expense. The increased signal strength requirement would also shrink the protected service area of Cinergy CG&E frequencies already located in the proposed Guard Band. The proposed thresholds would diminish the geographic areas that would be subject to interference protection in Cinergy PSI's entire service area, and in certain portions of Cinergy CG&E's service area, by 90% at -92 dBm, 92% at -89 dBm, 98% at -59 dBm, and 98% at -56 dBm.[16]

These technical restrictions would render the Guard Band spectrum incomparable. The relocation rules for the Upper 200 SMR channels require displaced incumbent licensees to receive comparable facilities, which they measure in terms of system, capacity, quality of service, and operating costs.[17] The FCC defines the term "quality of service" as "the same level of interference protection on the new system as on the old system."[18] Because the interference-prone Guard Band would diminish the protected service area of relocated and existing licensees, the replacement spectrum would not provide relocated licensees with comparable facilities.

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[16] The increased signal strength requirements would also adversely impact Cinergy CG&E's Business and I/LT frequencies. Because Cinergy CG&E could not comply with the increased signal strength threshold, the -98 dBm standard for existing systems would reduce its protected service area by 75%, while the -98 dBm standard for new systems would diminish its protected service area by 87.5%.

[17] 47 C.F.R. § 90.699(d).

[18] *Id.* § 90.699(d)(3).

The FCC should not condition a party's right to be free from interference upon system upgrades. If it does, however, the cost of upgrading all Guard Band licensees, both incumbents and licensees that are forced to relocate there, should be funded fully by Nextel. To the extent that Nextel does not fund the system upgrades to meet the heightened technical standards necessary to limit interference caused by its own operations, the incumbent's system should not have to comply with the rules in order to receive full protection. There is no justification for licensees to have to choose between expenditures resulting from a Nextel-caused problem and reduced or non-existent interference protection.

B. The Guard Band Rules Discriminate Against Critical Infrastructure Industry Licensees

1. The FCC Should Apply the Guard Band to the Cellular Portion of the 800 MHz Band

The FCC should locate the Guard Band in the spectrum allocated to cellular systems rather than in the spectrum reserved for systems that are not the source of harmful interference. The allocation of the 700 MHz band illustrates the illogical construction of the Guard Band in the Consensus Plan. Under section 337 of the Communications Act of 1934, as amended ("Communications Act"), Congress directed that commercial and Public Safety licensees share spectrum in the 700 MHz band.[19] Because Public Safety systems could be susceptible to interference, the FCC created two sets of Guard Bands to protect their operations from interference caused by commercial providers.[20] Unlike the proposed 800 MHz Guard Band, however, the FCC did not form a Guard Band in the spectrum reserved for Public Safety

[19] 47 U.S.C. § 337(a) (Supp. 2001).

[20] In re Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, WT Docket No. 99-168, *First Report and Order*, 15 F.C.C.R. 476, 489, 491 ¶ 30, 34 (2000).

operations. The FCC instead placed the Guard Band in the commercial allocation and limited the types of operations that could be conducted there.[21] It is entirely inequitable for Nextel to be given the right to interfere with licensees outside its assigned spectrum, who may have no ability to overcome this interference.

To the extent that a Guard Band is necessary in the 800 MHz band, the FCC should follow the 700 MHz precedent and impose this Guard Band and any technical and operational restrictions necessary to the protection of Public Safety on the cellular portion of the band at 816-818/861-863 MHz rather than at 814-816/859-861 MHz. Cinergy notes that one of the bases for Nextel's entitlement to a contiguous spectrum block is its purported ability to better manage intermodulation interference.[22] Nextel now seeks to impose on private wireless licenses the burden of absorbing this interference. In the event that Nextel receives a contiguous spectrum block, it should be held to its earlier representation and should accept the responsibility for managing interference.

2. The Guard Band Should Not Treat Similarly Situated Public Safety and Critical Infrastructure Industry Licensees Differently

The proposed rules should not mandate disparate treatment for Public Safety and Critical Infrastructure Industry licensees. As discussed in greater detail in Section VI.D below, the Consensus Plan confers several advantages on Public Safety licensees to the exclusion of Critical Infrastructure Industries, even though these licensees receive similar treatment under the Communications Act, perform similar functions, and require the ability to intercommunicate during emergencies.

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[21] *Id.*

[22] Reply Comments of Nextel Communications, Inc. WT Docket No. 02-55, Appendix II at 3 (Aug. 7, 2002).

This discrimination is even more pronounced in the Guard Band. Public Safety licensees are the only Guard Band licensees that could relocate their systems with full reimbursement and without obtaining RCC approval.[23] These licensees could move to channels vacated by Nextel in the 121-320 interleaved block or could reverse their decision to vacate the Guard Band at any time.[24] In contrast, Critical Infrastructure Industry licensees would have to remain in this interference-riddled band with effectively decreased protected service areas unless they could demonstrate that their "operations would significantly benefit from relocating out of the Guard Band" and could fund their own relocation.[25] While Cinergy's operations are clearly "mission critical" and deserve to relocate outside of the Guard Band, it should not have either to accept reduced interference protection or to relocate or modify its operations at its own expense to remedy interference caused by another entity. The proposed rules are silent on the RCC's standard of review or the possibility of appealing its decision on this issue. In any event, it would be unjust and unreasonable for the FCC to create a situation in which Critical Infrastructure Industries must request permission from Nextel and its colleagues on the RCC to relocate off of channels which are likely to receive interference from Nextel.

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[23] *Consensus Plan Supplement* at 10 n.14.

[24] *Id.* at 31, 32. The proposed rules also distinguish between Public Safety and critical infrastructure industries with respect to interference protection in the Guard Band. The Consensus Plan states that licensees in the Guard Band have limited protection from "CMRS-public safety interference." *Id.* at App. F-3. A literal interpretation of this statement would protect Public Safety licensees that remain in the Guard Band from interference, while denying such protection to any other licensee.

[25] *Id.* at 10 n.14.

IV. THE PROPOSED LICENSING FREEZES FORECLOSE THE EXPANSION OF CRITICAL INFRASTRUCTURE INDUSTRY COMMUNICATIONS SYSTEMS

The Consensus Plan would devastate the operations of Critical Infrastructure Industries, like Cinergy, by preventing them from expanding or modifying their systems. The Plan would accomplish this unconscionable result through a series of licensing freezes and other measures that restrict Business and I/LT access to vacated spectrum in the Business and I/LT Pool, while simultaneously expanding Public Safety access to these channels. The proposed rules would impose these measures with apparent indifference to the public safety services performed by Critical Infrastructure Industries.

The Consensus Plan would introduce two licensing freezes to foreclose Business and I/LT access to spectrum on a permanent basis. First, as Cinergy discussed in its Further Comments, the proposed rules would create a licensing preference for Public Safety applicants by granting them exclusive access to license Business and I/LT channels vacated by Nextel for a period of five years after the completion of relocation in a given NPSPAC region.[26]

Second, the proposed rules would freeze the licensing of Business and I/LT spectrum in channels 121-400 from the effective date of the *Report and Order* in this docket until the FCC grants all incumbent relocation applications in the region.[27] Business and I/LT licensees would inexplicably lose access to this vacant spectrum in the interleaved channels (even though the spectrum is not designated for relocated Public Safety systems), while the FCC would continue to process Public Safety applications for new assignments on interleaved Public Safety Pool

[26] *Id.* at 12.

[27] *Id.* at App. C-21. While the proposed rules state that the licensing freeze will commence on the effective date of the *Report and Order*, the text of the Supplemental Comments indicate that the freeze will begin on the date the FCC adopts the *Report and Order*. *Id.* at 12. The freeze

channels.[28] This freeze would preclude all Business and I/LT licensing activities by at least one to two years.[29]

In addition to these licensing freezes, the Consensus Plan would expand access to vacated Business and I/LT channels in the Guard Band. The proposed rules would permit Public Safety applicants to license these formerly exclusive Business and I/LT channels upon a demonstration that no Public Safety channels are available in a given area.[30]

While these proposed rules are individually draconian, in the aggregate they would have a devastating effect on Critical Infrastructure Industry licensees, such as Cinergy, that already lack the spectrum necessary to operate and expand their existing communications systems in response to changes in their service territories.

An immediate freeze on Business and I/LT licensing would essentially lock-down Critical Infrastructure Industry systems, blocking or substantially hindering licensees' ability to maintain and refine their systems. Wide-area utility systems, such as Cinergy's, require continual adjustment to ensure appropriate functionality. Freezes are significantly onerous to utilities because even minor power, height, or location adjustments can be foreclosed or require a waiver request. Cinergy recently experienced the negative effects of such a restrictive licensing measure when the FCC imposed a General Category freeze a few years ago. Although Cinergy had coverage gaps that adversely affected its public safety service operations, it could not obtain any channels to address these problems. The massive migration proposed in the Consensus Plan could magnify these problems exponentially because every General Category licensee would

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would permit modifications that would not increase the 22 dBu contour of the existing station. *Id.*

[28] *Id.* at 12.

[29] *Id.*

relocate (and on different timetables). The irresolvable coverage problems produced by this realignment would result in complete pandemonium. This would be an unacceptable result.

Furthermore, this freeze appears to be unnecessary to any policy objective expressly stated in the Consensus Plan. Specifically, freezing interleaved Business and I/LT spectrum not held by Nextel is at odds with the implicit premise of the five-year freeze on spectrum vacated by Nextel, which is that Nextel has more than enough Business and I/LT spectrum to complete Public Safety relocation (unless this is true, there would be no vacated spectrum to freeze). If Nextel has sufficient spectrum to complete Public Safety relocation, there would only be a need to freeze Nextel's spectrum as it is vacated and until relocation is complete to ensure that Public Safety has access to replacement spectrum.

Issues such as this one illuminate how the "Consensus Parties" are entirely *unrepresentative* of 800 MHz licensees. Nextel is given utter freedom under the Consensus Plan with regard to things such as license retention, *e.g.*, 900 MHz licenses, while incumbent licensees are the subject of compressed timeframes, license revocations, and freezes that are overbroad or groundless from a policy standpoint. Were the remaining Consensus Parties truly representing licensee constituencies rather than their own interests in establishing an administrative leviathan, the "Consensus Plan" would not be rife with such anti-licensee measures.

If the FCC determines that these licensing freezes and other measures are absolutely necessary, Cinergy urges the FCC to exempt Critical Infrastructure Industry licensees as well as Public Safety licensees. As explained in greater detail in Cinergy's Further Comments as well as below, legislative, presidential, and administrative policy support the similar treatment of these

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[30] *Id.*

entities.[31] Thus, the public interest would support the expansion of eligibility for this reserved spectrum to Critical Infrastructure Industries.

V. THE RCC-RELATED COMPONENTS OF THE CONSENSUS PLAN ARE UNLAWFUL

A. The FCC May Not Lawfully Delegate Policymaking Authority to a Private Party

The FCC lacks the authority to create directly or indirectly the Regional Coordination Committee ("RCC") for the purpose of implementing the proposed 800 MHz realignment plan. In particular, the proposed delegation of policymaking authority to the RCC violates either or both the Government Corporation Control Act or the Communications Act. Even if the RCC were to abandon its policymaking role and serve a purely advisory function, it would contravene the requirements of the Federal Advisory Committee Act of 1972.

1. The Creation of the RCC Would Violate the Government Corporation Control Act

The FCC lacks the specific statutory authority necessary to establish the RCC as proposed in the Supplemental Comments. The Government Corporation Control Act ("GCCA") states that "[a]n agency may establish or acquire a corporation to act as an agency only by or under a law of the United States specifically authorizing the action."[32] This statute "restrict[s] the creation of all Government-controlled policy-implementing corporations."[33] An agency may not create, or cause to be created, an ostensibly private corporation to perform governmental functions under the control of that agency without *specific legislation* authorizing the

[31] Reply Comments of Cinergy Corporation, WT Docket No. 02-55 at 15-17.

[32] 31 U.S.C. § 9102 (2003).

[33] *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 396 (1995).

establishment of a corporation.[34] The agency may not avoid this requirement by simply "directing another organization to act as the incorporator."[35]

The General Accounting Office ("GAO") has interpreted the GCCA to prohibit the FCC from creating private corporations almost identical to the RCC in purpose and policy-implementing responsibilities.[36] While the GAO acknowledged the broad powers conferred on the FCC by section 154(i) of the Communications Act,[37] it stated that this section "does not provide the specific statutory authority needed by the Commission to meet the requirements of the [GCCA]."[38] Then-Commissioner Michael Powell agreed with the GAO's assessment that the FCC must be granted specific statutory authority to create, or compel the creation, of a corporation and stated that "[t]o my knowledge, no law specifically authorizes the Commission to establish corporations" to implement universal service policies.[39]

When Congress has intended the FCC to have authority to create, or require the creation of, private corporations, it has demonstrated this by including specific provisions in the Communications Act. For example, section 614 of the Communications Act authorizes the

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[34] *Id.* at 396. Letter from Robert P. Murphy, General Counsel, U.S. General Accounting Office, to the Honorable Ted Stevens, United States Senate, B-278820 at 7 (Feb. 10, 1998), *available at* http://www.gao.gov [hereinafter *GAO Decision B-278820*].

[35] *GAO Decision B-278820* at 5.

[36] In a February 1998 letter, the GAO concluded that the FCC lacked the requisite legal authority to direct the National Exchange Carrier Association ("NECA") to create the Schools and Libraries Corporation and the Rural Health Care Corporation to implement certain universal service mechanisms. *Id.* at 1.

[37] Section 154(i) states that "[t]he Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions." 47 U.S.C. § 154(i).

[38] *GAO Decision B-278820* at 5. The GAO also noted that section 254 failed to authorize the FCC to create a private corporation to implement universal service. *Id.*

creation of the Telecommunications Development Fund ("TDF") as a private corporation for the implementation of governmental policy.[40] In addition, section 251(e)(1) authorizes the FCC "to create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis,"[41] while Section 332(b) permits the use of private corporations as frequency coordinators for the private mobile radio services in section 332(b).[42]

The statutory language, case law, and *GAO Decision B-278820* reveal certain factors about the RCC that would cause a violation of the GCCA. These factors include (1) the absence of a statute specifically authorizing the creation of a such an entity; (2) a federal agency creating or causing the creation of a corporation; (3) the corporation operating under the direction and control of the federal agency; and (4) the agency forming the corporation explicitly for the furtherance or implementation of federal governmental policies.

Despite the absence of the necessary statutory authorization, the proposed rules would require the FCC to create or cause the creation of the RCC. While the proposed rules would not expressly require the formation of a corporation, the proposed rules acknowledge that the members of the RCC may choose to organize as a private corporation in order to limit the

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[39] In re Report in Response to Senate Bill 1768 and Conference Report on H.R. 3579, *Report to Congress*, 13 F.C.C.R. 11,810, 11,866 (1998) (Separate Statement of Commissioner Michael K. Powell, Dissenting).

[40] 47 U.S.C. § 614(b).

[41] *Id.* § 251(e)(1).

[42] *Id.* § 332(b) ("The Commission, in coordinating the assignment of frequencies to stations in the private mobile services . . . shall have authority to utilize assistance furnished by advisory coordinating committees consisting of individuals who are not officers or employees of the Federal Government."); *see* In re Frequency Coordination in the Private Land Mobile Radio Services, PR Docket No. 83-737, *Report and Order*, 103 F.C.C.2d 1093 (1986).

liability of their respective constituent organizations for the mistakes that would likely occur during this complex and rushed realignment of the 800 MHz band.[43]

The FCC would also exercise substantial direction and control over the RCC. Agency authority to determine the organizational structure of, and appoint a majority of the representatives to, the board of directors of the corporation is sufficient control to invoke the requirements of the GCCA.[44] The FCC would establish the number of representatives on the RCC, set forth the representation from different industry segments, and appoint or approve the representatives.[45]

The FCC would effectively control appointment of RCC members by dictating the size and composition of this organization. While the FCC would expressly appoint Nextel as one representative on the RCC,[46] the proposed rules would require the appointment of the remaining four representatives from members of the LMCC, a group predominantly comprised of frequency coordinators previously approved by the FCC,[47] thus narrowing the number of potential members to twenty-one.

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[43] *Consensus Plan Supplement* at App. C-5. In any event, it is not clear that the GCCA is limited in application to business corporations because the intent of the law is to preclude delegation of agency authority to an outside agency without specific legislative authorization.

[44] *Lebron*, 513 U.S. at 397-98; *GAO Decision B-278820* at 8, App. 7-8.

[45] In addition to the membership requirements, the FCC would exercise control over the actions of the RCC. For example, the proposed rules define the purpose of the RCC, limit the range of duties it may perform, require the execution of confidentiality agreements with the FCC, define the process by which the RCC may appoint a Relocation Fund Administrator, and mandate the formation and composition of two working committees. *Consensus Plan Supplement* at App. C-4 through C-6. The FCC would also adopt detailed rules to micromanage the relocation process to be implemented by the RCC. *Id.* at App. C-6 through C-31.

[46] Although the proposed rules merely permit Nextel to choose a member, the text of the Supplemental Comments (which the FCC must adopt or reject without change) states that Nextel will serve on the RCC. *Id.* at 16.

[47] LMCC Membership List, http://www.lmcc.org/lmccmembers.htm (last visited Feb. 3, 2003).

The proposed rules would further require these four representatives to possess "the skill sets and licensing knowledge critical to implementing and completing" this massive realignment of certain specific portions of the 800 MHz band.[48] This requirement appears to limit eligibility to those frequency coordinators that possess the requisite technical qualifications and substantial experience in the realigned portion of the 800 MHz band. Because the FCC permitted only one frequency coordinator per service in the 800 MHz band until recently,[49] the rules are biased in favor of the formerly exclusive coordinators. In other words, the only LMCC members that would appear to meet the strict eligibility requirements imposed by the proposed rules are PCIA (Business), ITA (Industrial/Land Transportation), and APCO (Public Safety). Thus, by narrowing the pool of eligible candidates, the proposed rules would effectively vest in the FCC the power to appoint at least four of the five RCC representatives, rendering the RCC a government-controlled corporation for purposes of the GCCA.

The FCC would also form the RCC explicitly to carry out governmental policymaking functions arising from the realignment of the 800 MHz band. The proposed rules would enable the FCC to use this private corporation to undertake frequency allocations and assignments, dispute resolution, and the review and approval of reimbursement requests that are uniquely the province of the FCC under Title III of the Communications Act. Thus, because the FCC lacks the specific statutory authority to require the creation of the RCC to implement the 800 MHz realignment plan, the proposed rules would violate the GCCA.

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[48] *Consensus Plan Supplement* at 15.

[49] In re United Telecom Council Informal Request for Certification as a Frequency Coordinator in the PLMR 800 MHz and 900 MHz Bands, *Order*, DA 01-944 (Apr. 18, 2001).

2. The Creation of the RCC Would Exceed the FCC's Authority to Subdelegate

Even if the FCC were to conclude that it the GCCA did not foreclose the creation of the RCC, the proposed delegation of authority to a private party would constitute an unlawful subdelegation of authority.

a. The Communications Act Forbids the FCC from Subdelegating Authority to the RCC

The FCC lacks the statutory authority to subdelegate authority over the 800 MHz realignment to the RCC. While Congress may delegate authority to an agency, further subdelegation of that authority by the agency is impermissible if a statutory provision specifically limits the agency's authority to delegate to certain designated entities,[50] even if a generally applicable statutory provision otherwise would confer broad duties and powers on the agency.[51] Agencies also may not subdelegate their authority to private parties.[52]

In *Shook v. District of Columbia Financial Responsibility and Management Assistance Authority,*[53] the D.C. Circuit held that an agency could not delegate executive functions or policymaking authority to a private party.[54] The court reasoned that the plain language of the

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[50] *United States v. Giordano*, 416 U.S. 505, 514 (1974).

[51] *Shook v. District of Columbia Fin. Responsibility and Mgmt. Assistance Auth.*, 132 F.3d 775 (D.C. Cir. 1998); *Halverson v. Slater*, 129 F.3d 180 (D.C. Cir. 1997).

[52] *Shook*, 132 F.3d at 784 n.6 ("[W]e often have upheld an agency head's ability to delegate duties to subordinate officers . . ., but these cases do not involve delegations of agency authority to outside parties."); *see United States v. Mango*, 199 F.3d 85, 90 (2d Cir. 1999) (ruling that subdelegation within an agency is permissible, in contrast to subdelegation to private parties); *see also Sierra Club v. Sigler*, 695 F.2d 957, 962-63 n.3 (5th Cir. 1983) ("[A]n agency may not delegate its public duties to private entities, particularly private entities whose objectivity may be questioned on grounds of conflict of interest.").

[53] 132 F.3d 775.

[54] *Shook*, 132 F.3d at 784. The statute governing delegation permitted the agency to "to delegate any of its authority to the Superintendent" who could then "redelegate any of his or her authority

statute prohibited the agency to delegate its authority to anyone but the official specifically designated in the statute, *i.e.*, the Superintendent.[55] The court also applied the *expressio unius est exclusio alterius* canon of statutory construction and found that the mention of the Superintendent implied the exclusion of alternative subdelegees.[56] After examining the structure of the statute, the court also found that the proposed delegation to outside parties conflicted with the statute because "it would be unusual, if not unprecedented, for Congress to authorize the [agency] to delegate its own governing authority, its policymaking function, to another outside multi-member body."[57] In addition, the court ruled that the attempted delegation "is inconsistent with the hierarchical framework" of the statute because it elevates a subordinate subdelegee above the Superintendent.[58] Thus, the court concluded that the agency's attempted delegation of policymaking authority to private parties was *ultra vires*.[59]

The Communications Act precludes the subdelegation of policymaking authority to the RCC. In particular, section 155(c)(1) authorizes the FCC to "delegate any of its functions . . . to a panel of commissioners, an individual commissioner, an employee board, or an individual

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subject to the approval of the [agency]." *Id.* at 777. The agency, however, had attempted to delegate "'the immediate responsibility for operation and management of the District of Columbia public school system'" directly to a Board of Trustees comprised entirely of outside parties. *Id.* at 782.

[55] *Id.* at 782.

[56] *Id.* at 782-84; *see also Halverson*, 129 F.3d at 185-86, 186 n.8 (finding that the *expressio unius* doctrine would exclude delegations to non-Coast Guard officials because the delegation provision delineated the class of permissible delegatees as officers, employees, and members of the Coast Guard, or, in special circumstances, certain Customs Service officers or employees).

[57] *Shook*, 132 F.3d at 783.

[58] *Id.* at 783-84.

[59] *Id.* at 784.

employee . . . ."[60] Because the Communications Act expressly addresses the matter of delegation, and specifically limits the FCC's authority to certain clearly defined entities, the clear and unambiguous language of section 155(c)(1) permits the delegation of authority only to employees of the FCC. In accordance with the *expressio unius* canon of statutory construction, the failure to mention any non-FCC employees in the delegation provision raises a negative implication that the FCC may not subdelegate to outside parties.

Although the Consensus Parties have suggested that the FCC would possess authority to create the RCC under its general duties and powers of section 154(i),[61] several other canons of statutory construction would prohibit the FCC's subdelegation to private parties under this provision. First, if statutes are potentially in conflict, courts will "'read the statutes to give effect to each if [it] can do so while preserving their sense and purpose.'"[62] Although section 154(i) permits the FCC "to perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions,"[63] the invocation of this general provision to subdelegate to private parties, such as the

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[60] 47 U.S.C. § 155(c). Several other provisions in the Communications Act recognize section 155(c)(1) as the only statutory authority permitting the FCC to delegate its functions. *E.g.*, *id.* § 405 (governing petitions for reconsideration by any designated authority pursuant to a delegation under section 155(c)(1)); *Id.* § 409(b)-(c)(1) (governing adjudications designated by the FCC for hearing under section 155(c)(1)).

[61] *Consensus Plan Supplement* at App. C-5.

[62] *Halverson*, 129 F.3d at 185 (quoting Watt v. Alaska, 451 U.S. 259, 267 (1981)). In *Halverson v. Slater*, the D.C. Circuit reconciled two delegation statutes by ruling that a statute generally concerning agency delegation did not subsume a statute specifically governing delegation under a certain subtitle. *Id.* at 185. In that case, the general delegation statute permitted the Secretary of Transportation to subdelegate to anyone in the department, while the specific delegation statute limited subdelegation to the certain members of the Coast Guard. *Id.* at 183-84. The court concluded that the application of the general delegation statute would render the more specific delegation statute superfluous, thus contravening the doctrine that "Congress cannot be presumed to do a futile thing." *Id.* at 185.

[63] 47 U.S.C. § 154(i).

RCC, would render the specific grant of delegation authority in section 155(c)(1) meaningless. Congress would have had no need to limit subdelegation in section 155(c)(1) if the FCC possessed the inherent authority to subdelegate to anyone under section 154(i).

Congress also anticipated and resolved this potential conflict by requiring the FCC to exercise its section 154(i) authority in a manner "not inconsistent with this chapter."[64] Because the interpretation of section 154(i) to allow subdelegation to private parties would be inconsistent with the specific limitation on subdelegation in section 155(c)(1), section 154(i) would not permit the FCC to subdelegate to a private party, such as the RCC.

Even if these two statutory provisions were irreconcilable, "'where a specific provision conflicts with a general one, the specific controls.'"[65] Thus, the specific limitations on delegation in section 155(c)(1) trump the more general pronouncements about the FCC's general duties and powers in section 154(i).

Furthermore, the overall purpose and scheme of the Communications Act also indicate that the FCC lacks authority to subdelegate to private parties. As in *Shook*, the subdelegation of the FCC's policymaking authority to an outside multi-member body, *i.e.*, the RCC, would be inconsistent with its authority over radio spectrum licensing in the Communications Act. By granting the RCC unreviewable policymaking and dispute resolution authority in some areas, the proposed rules essentially invert the hierarchical order of the agency. The FCC would become subordinate to the RCC with respect to certain decisions resulting from arbitration, a circumstance that is antithetical to the Communication Act's fundamental organizational structure.

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[64] *Id.*

[65] *Halverson*, 129 F.3d at 185-86 (quoting Edmund v. United States, 520 U.S. 651, 657 (1997)).

b. The Proposed Rules Also Attempt to Subdelegate Authority that the FCC Does Not Possess

Even if the FCC could subdelegate authority to private parties, it could not immunize those parties from administrative or judicial review of their decisions. The proposed rules attempt to circumvent these restrictions by authorizing RCC-appointed panels to conduct binding arbitration on certain licensing matters. The Communications Act, and other relevant statutes, protect individuals aggrieved by decisions of delegated authorities by preserving the right to appeal those decisions to the FCC and, ultimately, to a U.S. Court of Appeals.[66] Thus, the proposed rules violate these statutory provisions by foreclosing all avenues of appeal for decisions made by the RCC-selected arbitration panel.

3. The Consensus Plan Violates the Federal Advisory Committee Act

Even if the FCC were to employ private parties to *assist* with the implementation of an 800 MHz realignment plan, it could only do so in strict adherence with the Federal Advisory Committee Act of 1972 ("FACA").[67] In *Shook*, the D.C. Circuit suggested that an agency

[66] 47 U.S.C. § 155(c)(4) ("Any person aggrieved by any . . . order, decision, report, or action [taken pursuant to delegated authority] may file an application for review by the Commission . . . ."); *Id.* § 402 (granting right to bring a "proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter . . . ."); *Id.* § 405 (permitting any person aggrieved or adversely affected by an order, decision, report, or action by a designated authority under section 155(c)(1) to petition for reconsideration with that designated authority); *Id.* § 409 (permitting parties to adjudicative hearings to file exceptions and memoranda to the initial, tentative, or recommended decision of a designated authority under section 155(c)(1)); 28 U.S.C. § 2344 ("Any party aggrieved by the final order may . . . file a petition to review the order in the court of appeals wherein venue lies."); 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action . . ., is entitled to judicial review").

[67] 5 U.S.C. App. 2 § 1-16 (2002). The adoption of the Consensus Plan itself would also conflict with the underlying purpose of the FACA, which is to prevent "the proliferation of unknown and sometimes secret 'interest groups' or 'tools' employed to promote or endorse agency policies." *Gates v. Schlesinger*, 366 F. Supp. 797, 799-800 (D.D.C. 1973) (citing 118 Cong. Rec. S14644 at S14649 (daily ed. Sept. 12, 1972) (Remarks of Senator Percy); *see* 118 Cong. Rec. H4275-86 (daily ed. May 9, 1972); 118 Cong. Rec. H8454-57 (daily ed. Sept. 18, 1972); 118 Cong. Rec.

desiring to rely on the expertise of private parties could create an advisory board to recommend certain actions and policies.[68] As currently formulated, however, the RCC does not comply with the FACA because it would not (1) contain a fairly balanced membership; (2) avoid the inappropriate influence of special interest groups; and (3) include an FCC representative.[69]

a. The Proposed RCC Lacks a Fairly Balanced Membership

The proposed rules fail to provide adequate representation on the RCC for licensees affected by the realignment of the 800 MHz band. Section 5(b)(2) of the FACA "require[s] the membership of the advisory committee to be fairly balanced in terms of the points of view represented and the functions to be performed."[70] The implementing regulations elaborate that an agency overseeing an advisory committee must have a "plan" to ensure "fairly balanced

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S15285-86 (daily ed. Sept. 19, 1972); 118 Cong. Rec. H8610-11, (daily ed. Sept. 20, 1972); H.R. Rep. No. 1017, *reprinted in* 1972 U.S.C.C.A.N. 3491). The Consensus Parties have produced a secretly negotiated "all-or-nothing" proposition that exerts undue pressure on the FCC to adopt the plan as formulated or risk losing a substantial sum of money "voluntarily" offered by Nextel to address the problem.

[68] *Shook*, 132 F.3d at 784.

[69] 5 U.S.C. App. 2 § 5(b)(2). These requirements would apply to the RCC because the FCC would "establish" the RCC or "utilize" it in an advisory capacity. *Id.* § 3(2)(C). While a few courts have concluded that section 5(b) applies only to advisory committees established by statute, the majority of courts hold that section 5(c) requires the application of these guidelines to advisory committees established by agencies. *Cargill, Inc. v. United States*, 173 F.3d 323, 334 n.17 (5th Cir. 1999); *National Anti-Hunger Coalition v. Executive Committee of the President's Private Sector Survey of Cost Control*, 711 F.2d 1071, 1073 n.1 (D.C. Cir. 1983); *see* 5 U.S.C. App. 2 § 5(c).

[70] 5 U.S.C. App. 2 § 5(b)(2). *Northwest Ecosystem Alliance v. Office of the United States Trade Representative*, 1999 U.S. Dist. LEXIS 21689 *23-24 (W.D. Wash. 1999) (holding that an advisory committee violated the "fairly balanced" requirement of the FACA because the committee "offer[ed] advice on diverse and far-reaching issues that affect others" and consisted solely of timber industry representatives to the exclusion of environmental groups); *National Anti-Hunger Coalition v. Executive Committee of the President's Private Sector Survey on Cost Control*, 566 F. Supp. 1515, 1516-17 (D.D.C. 1983).

membership" and to guarantee that "the agency will consider a cross-section of those directly affected, interested, and qualified, as appropriate to the nature and functions of the committee."[71]

The RCC fails to satisfy the "fairly balanced membership" requirement because it would not contain a diversity of viewpoints. The rules contain no protection against LMCC selecting four Consensus Plan signatories as the representatives to the RCC. While the LMCC-nominated entities may nominally have some relationship to public safety entities or the private wireless industry, by definition they are adverse to the many non-signatories to the Plan. In addition, the RCC membership would not be fairly balanced because only Nextel and members of the LMCC, who are predominantly frequency coordinators with a strong financial interest in maximizing relocations,[72] are eligible to serve on the RCC.

b. The RCC Fails to Avoid Inappropriate Influence from Special Interest Groups

The proposed rules would not prevent special interest groups from exercising "inappropriate influence" over the RCC. Section 5(b)(3) of the FACA requires an administrative agency to promulgate "appropriate provisions to assure that the advice and recommendations of the advisory committee will not be inappropriately influenced by . . . any special interest . . . . "[73] The "inappropriate influence" requirement is designed to protect against "the danger of allowing

[71] 41 C.F.R. § 102-3.60(b)(3); *see Public Citizen v. National Advisory Comm. on Microbiological Criteria for Foods*, 886 F.2d 419, 423 (D.C. Cir. 1989) (citing S. Rep. No. 1098, at 4-5 (1972)) (noting that the "fairly balanced" provision was designed to counter "the belief that these committees do not adequately and fairly represent the public interest [or] that they may be biased toward one point of view or interest"); *National Anti-Hunger Coalition v. Executive Committee of the President's Private Sector Survey of Cost Control*, 711 F.2d 1071, 1074 n.2 (D.C. Cir. 1983) (citing S. Rep. No. 1098, at 9 (1972); H.R. Rep. No. 1017 at 6 (1972)) ("[T]he legislative history makes clear [that] the 'fairly balanced' requirement was designed to ensure that persons or groups directly affected by the work of a particular advisory committee would have some representation on the committee.").

[72] LMCC Membership List, http://www.lmcc.org/lmccmembers.htm (visited Feb. 3, 2003).

special interest groups to exercise undue influence upon the Government through their dominance of advisory committees which deal with matters in which they have vested interests."[74]

To ascertain the presence of an inappropriate influence on an advisory committee, the FCC must examine the concern of the special interests in the committee as well as the relationship of the individual representatives to the special interests.[75] The proposed members of the RCC, such as frequency coordinators – who would have an exclusive right to provide coordination service to rebanded licensees, have a vested interest in the relocation process that makes them susceptible to inappropriate influence in the performance of their duties. Nextel would clearly have an inappropriate influence on the RCC because it is the source of the alleged interference problem and would receive a refund of funding that remains unallocated by the RCC.

c. The RCC Would Not Include a Representative of the FCC

The proposed rules also fail to provide for the appointment of an FCC representative to the RCC, as mandated by section 10 of the FACA.[76] The FACA contemplates the active participation of an FCC representative on an advisory committee to protect the proceedings from

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[73] 5 U.S.C. App. 2 § 5(b)(3).

[74] *Microbiological Criteria*, 886 F.2d 419 (citing H.R. Rep. No. 1017 at 6, *reprinted in* 1972 U.S.C.C.A.N. at 3496).

[75] *Cargill*, 173 F.3d at 338-39; *Microbiological Criteria*, 886 F.2d at 425-26.

[76] 5 U.S.C. App. 2 §10(e) ("[t]here shall be designated an officer or employee of the Federal Government to chair or attend each meeting of each advisory committee . . . No advisory committee shall conduct any meeting in the absence of that officer or that employee."); *Id.* § 10(f) ("[a]dvisory committees shall not hold any meetings except at the call of, or with the advance approval of, a designated officer of the Federal Government [and] . . . with an agenda approved by such officer or employee.").

capture by special interest groups. The absence of this fundamental protection would enable the manipulation of the RCC by certain members.

d. The Proposed Rules Improperly Delegate Authority to the RCC under the Federal Advisory Committee Act

Even if the FCC were to comply with the rules governing the establishment of an advisory committee, the role and responsibility of the RCC would exceed the delegation authority of the FCC under the FACA. Because section 2 of the FACA states that "the function of the advisory committees should be advisory only,"[77] the FACA prevents the delegation of implementation or policymaking authority to an advisory committee. The proposed rules would violate this limit on advisory committees by granting the RCC the authority to implement the relocation procedures and to make binding policy decisions.

B. The Administration of the RCC Violates the Due Process Clause of the U.S. Constitution

In addition to the statutory impediments that would preclude the creation of the RCC, the composition of this committee would also violate the Fifth Amendment of the U.S. Constitution, which protects against the "depriv[ation] of life, liberty, or property, without due process of law."[78] The Fifth Amendment applies to the proposed realignment of the 800 MHz band because incumbent licensees, such as Cinergy, stand to lose the substantial investments in their land mobile communications systems. Although Cinergy could recoup certain expenses arising from the relocation of a substantial portion of its communications system to the Guard Band, the proposed rules confer on the RCC considerable authority over the allocation of these funds and the specific spectrum assignments. Because the composition of the RCC would prevent it from

[77] *Id.* § 2(b)(6).

[78] U.S. Const. amend. V.

performing these responsibilities in an impartial manner, the proposed realignment would deprive incumbent licensees of the protected property interests in their communications systems without due process.

Under the Fifth Amendment, the government must provide an impartial decisionmaker. The decisionmaker should not possess "a direct personal, substantial, pecuniary interest," whether direct or indirect, in the outcome of the proceeding.[79] The existence of an actual bias is not necessary to prove a violation because "the adjudicator's pecuniary or personal interest in the outcome of the proceedings may create an *appearance of partiality* that violates due process . . ."[80] The U.S. Supreme Court has affirmed that a decisionmaking body may not take action that impacts the business operations of a company under its jurisdiction if the members of that body would benefit financially from that particular action, despite the absence of any evidence demonstrating actual bias.[81]

To determine whether a decisionmaker is unconstitutionally biased, courts have examined (1) the degree of pecuniary interest; and (2) the extent to which the circumstances, such as the prior relationship between the decisionmaker and the party and statements by the decisionmaker, support an inference of actual bias.[82] "Where one member of a tribunal is actually biased, or where circumstances create the appearance that one member is biased, the

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[79] *Connally v. Georgia*, 429 U.S. 245, 250-51 (1977); *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973); *Stivers v. Pierce*, 71 F.3d 732 (9th Cir. 1995).

[80] *Stivers*, 71 F.3d at 741 (citing *Gibson*, 411 U.S. at 578).

[81] *Gibson*, 411 U.S. at 570-572, 579 (affirming that a state Board of Optometry was impermissibly biased and thus foreclosed from shutting down the practice of a large optometry company because members of the Board would benefit financially if the company ceased operations in the state).

[82] *Stivers*, 71 F.3d at 742.

proceedings violate due process."[83] Thus, if a single decisionmaker has a substantial pecuniary interest, it would violate the constitutional right to due process and potentially disqualify an entire panel of decisionmakers.[84]

The proposed composition of the RCC would violate due process because it would at least give the appearance of partiality. While the proposed rules would expressly appoint Nextel to the RCC, the qualifications for membership would effectively be limited to a few frequency coordinators who depend on Nextel for substantial frequency coordination business. Because these entities are tainted by their substantial pecuniary interests in the outcome of the 800 MHz realignment, the FCC would have to disqualify them from serving on the RCC.

In particular, Nextel should not be allowed to participate in the policymaking responsibilities of the RCC. Understandably, Nextel's overwhelming motive is to advance the interests of its shareholders by minimizing its liability for relocating incumbent licensees and by increasing its customer base. For these reasons, Nextel would have a substantial pecuniary interest in the RCC's policymaking functions.

While a single biased decisionmaker could disqualify an entire panel of decisionmakers, the remaining members of the RCC, if they were frequency coordinators, could also have an impermissible bias in favor of Nextel. For example, ITA and PCIA could not meet the test of impartial decisionmakers because they are signatories to Nextel's Consensus Plan, have a substantial financial stake in the outcome (*e.g.*, they presumably would have an exclusive right to the frequency coordination business generated by the Plan), and have a history of business relationships with Nextel that make them susceptible to conflicts of interest.

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[83] *Id.* at 748.

[84] *Id.*

APCO, as a frequency coordinator, would also reap substantial financial benefits from its position on the RCC. By controlling the frequency planning and coordination for Public Safety entities under the 800 MHz realignment plan, APCO would have an incentive to maximize its revenue. In addition to this revenue motive, APCO has been the beneficiary of at least one significant grant from Nextel. Approximately one week after APCO formally became a signatory of Nextel's Consensus Plan, Nextel provided it with a $3.75 million grant for its "Public Safety Foundation of America."[85] While this financial support may be for the best of reasons and otherwise in the public interest, it definitely disqualifies APCO from serving as an impartial decisionmaker on the RCC.

The susceptibility of any frequency coordinators participating on the RCC to business conflicts is evident by reviewing recent frequency coordination work performed for Nextel by ITA and PCIA. Based on FCC licensing records, ITA has received approximately 30% of its coordinating business from Nextel since August 2002[86] and PCIA has derived 20% of its business from Nextel during the same time frame.[87] Any coordinator with a pecuniary interest in

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[85] *APCO Foundation Receives Grant from PSAP Readiness Fund*, PR Newswire, Aug. 15, 2002. It is not known whether APCO has received additional grants from this fund or whether APCO would qualify for additional grants from Nextel. The potential for future grants would raise further questions as to whether APCO would be likely to take actions that could be perceived as antagonistic to Nextel.

[86] A frequency coordinator's business can be dramatically affected by major clients, such as Nextel. For example, between July 2001 and October 2001, ITA coordinated and submitted an average of 134 Nextel applications a month. After aligning itself against Nextel's White Paper, ITA only submitted a total of 15 Nextel applications over the next seven months, for an average of approximately 2 applications per month. As ITA began working with Nextel on the Consensus Plan in July 2002, ITA's business revived as it submitted 183 Nextel applications. This number rose to 551 Nextel applications with the filing of the Consensus Plan in August. During the final five months of 2002, ITA derived over 30% of its business from the 1,313 Nextel applications that it submitted to the FCC.

[87] An interesting trend also appears when examining PCIA's frequency coordination work for Nextel over the past twelve months. Between January 2002 and April 30, 2002, PCIA coordinated and submitted an average of 181 Nextel applications every month, for a total of 725

the frequency coordination work resulting from the Consensus Plan as well as a significant business relationships with Nextel could not be viewed as impartial.

While business dealings between frequency coordinators and Nextel are perfectly appropriate in the normal course, these ties become unacceptable should these entities move into positions (such as proposed for the RCC) where they would be expected to act as completely impartial administrators of a rebanding process affecting thousands of licensees.

VI. THE PROPOSED RELOCATION PROCEDURES OFFER LITTLE PROTECTION FOR INCUMBENT LICENSEES

A. The Submission of Proprietary Information Is Unnecessary for the Development of a Relocation Plan

The FCC should not require Critical Infrastructure Industries, or any other incumbent licensees, to submit the information requested in the proposed rules. For example, the Consensus Plan requires all licensees in channels 1-120 in the top 14 NPSPAC regions to provide the RCC with "a full description of their licensed systems . . . within 45 days of the effective date of the Report and Order . . . ."[88] The proposed rules demand a laundry list of information, including intricate details of these communications systems, and require licensees to explain or elaborate on their submissions at the whim of the RCC.[89] The proposed disclosure of this information would be inappropriate because the information is crucial to the nation's security and consists of proprietary information.

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applications. After filing Comments in this proceeding that opposed Nextel's White Paper, PCIA's business from Nextel dropped dramatically to an average of 53 a month for the next two months. In August 2002, however, PCIA signed the Consensus Plan and had its Nextel applications leap to 334 for that single month, representing one-third of PCIA's total business that month. Since August 2002, Nextel applications have provided PCIA with approximately 20% of its coordination business.

[88] *Consensus Plan Supplement* at 18-19.

[89] *Id.* at App. C-6-7, C-7-16.

1. The Requested Information Is Crucial to the Nation's Security

The requested information would include extremely sensitive materials concerning the communications systems of Critical Infrastructure Industries. The war on terrorism has alerted Critical Infrastructure Industries to the importance of safeguarding this information, especially after the military discovered that terrorists had obtained diagrams of American nuclear power plants and information on how to program digital devices that control utility systems.[90]

Congress also understands the critical nature of critical infrastructure information voluntarily submitted to the government and has wisely adopted measures to prevent its disclosure.[91] Specifically, the Homeland Security Act of 2002 requires the protection of "information not customarily in the public domain and related to the security of critical infrastructure or protected systems."[92] To prevent potentially harmful access to this information, this statute exempts critical infrastructure information from disclosure under the Freedom of Information Act, restricts the use and disclosure of this information by government officials, and imposes criminal penalties for violations.[93] The FCC has been given no comparable authority to

[90] Barton Gellman, *Cyber-Attacks by Al Qaeda Feared: Terrorists at Threshold of Using Internet as Tool of Bloodshed, Experts Say*, WASH. POST, June 27, 2002, at A01; Jayson Blair, Post-9/11, Questions About Security at Electric Plants, N.Y. TIMES, May 17, 2002; Robert Charles, *Priority Required for Protecting Utilities*, WASH. TIMES, Mar. 4, 2002, at A17; David Johnston and James Risen, *Seized Afghan Files Show Intent, Not Plans*, N.Y. TIMES, Feb. 1, 2002, at A13.

[91] Homeland Security Act of 2002, Pub. L. No. 107-296 § 214(e)(1) (2002).

[92] *Id.* § 212(3) (2002).

[93] *Id.* § 214(a)(1)(A), (a)(1)(D), (f). The Act also emphasizes the protection of utility systems and operations from disruption and requires the Directorate to develop a "comprehensive national plan for securing the key resources and critical infrastructure of the United States, including power production, generation, and distribution systems, information technology and telecommunications systems, and emergency preparedness communications systems." *Id.* § 201(d).

protect such information from disclosure and would certainly be unable to safeguard information that it requires to be disclosed to the RCC and any of its consultants.

2. The Proposed Rules Unreasonably Request Proprietary Information

In addition to its concerns about national security, Cinergy also objects to the disclosure of this proprietary information because it would provide a commercial and strategic advantage to Nextel and the consultants affiliated with the frequency coordinators. Any information necessary to develop frequency plans or otherwise conduct the duties of the RCC is readily available in the Universal Licensing System. If additional information is required, the RCC/Nextel should have to make a special showing, justifying the specific need to go beyond what it publicly available.

While the FCC has previously required the disclosure of certain information in connection with the relocation of incumbents in the upper 200 SMR channels and the 2 GHz band, the rules did not provide for a public disclosure of the magnitude encompassed in the Consensus Parties' proposal. In the earlier proceedings, the rules only compelled the licensees to negotiate in good faith by providing information *reasonably* necessary to facilitate relocation.[94] The rules also limited disclosure to the negotiating parties.[95] Under this well-established precedent, the information required in the proposed rules would far exceed the bounds of reasonableness to include information that is not necessary to commence the negotiation process.

Thus, if the FCC must require disclosure of proprietary information, it should limit the scope of that information, should impose a reasonableness requirement, and should restrict disclosure to the negotiating parties after the commencement of negotiations.

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[94] 47 C.F.R. § 90.699(b)(2); *see also id.* § 101.73(b) (defining "good faith negotiations").

B. The Consensus Plan Would Prohibit the Deployment of Advanced Systems

The FCC's long-standing policy of encouraging flexible spectrum use and innovative technologies[96] precludes the prohibition of cellular architecture below 816/861 MHz, as proposed in the Consensus Plan.[97] The FCC's Spectrum Policy Task Force affirmed the soundness of this policy in late 2002.[98] After completing a comprehensive and systematic review of the FCC's spectrum policy, the Task Force recommended that the FCC "avoid rules that restrict spectrum use to particular services or applications," while adopting "more flexible rights models that create opportunities for new, more efficient and beneficial uses."[99]

In addition to conflicting with FCC policy, the prohibition hinders the development and deployment of advanced systems by Public Safety and Critical Infrastructure Industry licensees, which is contrary to the public interest. As Cinergy described in greater detail in its Further

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[95] *Id.* §§ 90.699(b)(2), 101.73(b).

[96] *E.g.*, In re Principles for Reallocation of Spectrum to Encourage the Development of Telecommunications Technologies for the New Millennium, *Policy Statement*, 14 F.C.C.R. 19868 ¶ 2 (1999) (committing to "pursue . . . policies that . . . encourage the development of emerging telecommunications technologies); *see, e.g.*, In re Petitions for Reconsideration of the Second Memorandum Opinion and Order, Service Rules for the 746-764 and 776-794 MHz Bands and Revisions to Part 27 of the Commission's Rules, WT Docket No. 99-168, *Third Memorandum Opinion and Order*, 17 F.C.C.R. 13985 ¶ 2 n.7 (2002); In re Principles for Promoting the Efficient Use of Spectrum by Encouraging the Development of Secondary Markets, *Policy Statement*, 15 F.C.C.R. 24178, 24181 (2000).

[97] Reply Comments of Aeronautical Radio, Inc., American Mobile Telecommunications Association, American Petroleum Institute, Association of American Railroads, Association of Public-Safety Communications Officials-International, Inc., Forest Industries Telecommunications, Industrial Telecommunications Association, Inc., International Association of Chiefs of Police, International Association of Fire Chiefs, Inc. and International Municipal Signal Association, Major Cities Chiefs Association, Major County Sheriffs' Association, National Sheriffs' Association, Nextel Communications, Inc., Personal Communications Industry Association, National Stone, Sand and Gravel Association, and Taxicab, Limousine and Paratransit Association 9 (Aug. 7, 2002); *Consensus Plan Supplement* at 10, App. C-1.

[98] Spectrum Policy Task Force, ET Docket No. 02-135, *Report* (Nov. 2002) [hereinafter *Spectrum Policy Task Force Report*].

Comments,[100] it had developed plans and acquired frequencies for a new digital iDEN system prior to the submission of the Nextel White Paper. This new system will enable Cinergy to meet its changing and challenging business needs by increasing its efficiency and its response time to correct system problems as well as by migrating to a platform that will be more flexible and better separated. Despite this conscientious effort to plan for the future, the initiation of this 800 MHz realignment proceeding has created regulatory uncertainty in this band and forced Cinergy to cease the deployment of its new system immediately. Moreover, the ultimate adoption of the Consensus Plan would permanently foreclose Cinergy from proceeding with its iDEN system because of the prohibition on cellular architecture.

A prohibition on cellular systems is unnecessary to protect Public Safety licensees. The Task Force addressed whether the FCC should prohibit cellular operations in certain bands and concluded that such a restriction is appropriate only if *necessary to prevent harmful interference*.[101] A broad prohibition below 816/861 MHz is over-inclusive because no documented correlation exists between cellular architecture *per se* and interference to 800 MHz licensees. The anecdotal evidence that does exist indicates that *Nextel's* use of its cellular architecture cause different levels of interference for reasons that are not fully clear.[102] For example, while most interference is attributable to Nextel's system, the design and construction of Southern LINC's system almost never results in interference complaints. In addition, the definition of "cellular" employed by the proposed rules would include a number of analog sites

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[99] *Id.* at 16, 46.

[100] Further Comments of Cinergy Corporation, WT Docket No. 02-55 16-23 (Sept. 23, 2002).

[101] *Spectrum Policy Task Force Report* at 17 ("technical parameters should . . . be limited to those that are necessary to define the user's RF environment in terms of maximum allowable output and required tolerance of interference").

[102] APCO Project 39, http://www.apcointl.org/frequency/project_39/downloads/combined.txt.

currently in operation and that do not appear to be causing any interference in the 800 MHz band.

C. The Timing, Negotiation, and Arbitration Rules Combine to Limit the Rights of Incumbent Licensees

The proposed rules offer incumbent licensees the right to negotiate and arbitrate the relocation of their communications systems yet incorporate certain built-in restrictions and timing limitations that effectively undermine those rights. If realignment is absolutely necessary, then Cinergy endorses the model rules set forth in Appendix B, which are adapted from the relocation rules for the 800 MHz Upper 200 SMR channels and the 2 GHz band.

The Consensus Plan severely circumscribes the scope of the negotiation and arbitration process. During the negotiation process, incumbent licensees may only discuss issues of timing, funding, and the likelihood that the proposed relocation plan would avoid "significant disruption."[103] The arbitration rules are even narrower than the negotiation rules, permitting the parties to arbitrate only "cost and timing" issues and forbidding the appeal of these issues to the FCC.[104] Although the proposed rules would allow the FCC to review whether the replacement *frequencies* are "comparable,"[105] they would apparently not allow incumbent licensees to protest the comparability of the replacement facilities. In contrast, the relocation rules for the Upper 200

[103] *Consensus Plan Supplement* at 21.

[104] *Id.* at App. C-19, C-22.

[105] *Id.* at App. C-22. If this right to appeal refers the frequencies, then the FCC should place the RCC frequency plans on Public Notice. The stated reason for skipping public comment is "because no interested parties' rights would be adversely affected by coordination of the frequency plans." *Id.* at App. C-17. By permitting incumbent licensees to appeal this issue, however, the signatories to the Consensus Plan acknowledge that the comparability of frequencies would, in fact, adversely affect interested parties.

SMR channels and the 2 GHz band did not impose such arbitrary restrictions on the negotiation process, while granting several incumbent licensees several additional rights.[106]

In addition, the proposed timing rules limit the effectiveness of the negotiation and arbitration rights by requiring licensees to complete relocation within six months of the FCC's approval of the new channel assignment.[107] This abbreviated negotiation period stands in stark contrast to the lengthier negotiation periods permitted in the rules for the Upper 200 SMR channels and the 2 GHz band, which provide at least two years to negotiate a relocation.[108]

Despite this strict time limit, the negotiation period starts to run on the effective date of the *Report and Order* rather than upon the commencement of the actual negotiations. This timing limitation is unfairly weighted in Nextel's favor because Business and I/LT licensees have no right to compel Nextel to commence the negotiation process, Nextel is not subject to any sanctions for failing to submit a relocation proposal promptly, and no extensions of the deadline are possible.[109] Instead of permitting Nextel alone to determine the length of the negotiation period,[110] Cinergy recommends that any relocations follow the rules set forth in Appendix B, which provide for the parties to negotiate a reasonable period of time for relocation.[111]

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[106] 47 C.F.R. § 101.75 (granting incumbent licensees to examine the replacement facilities for a reasonable period of time in order to make adjustments, determine comparability, and ensure a seamless handoff as well as to use the replacement spectrum for a trial period).

[107] *Consensus Plan Supplement* at 23, App. C-18 (establishing a fixed nine-month negotiation period that commences upon the certification of the frequency plan, although parties only have six months remaining after the approval of the new channel assignment).

[108] 47 C.F.R. §§ 90.699; 101.71, 101.73.

[109] Although the Consensus Plan would grant Public Safety licensees extensions of time as well as non-binding arbitration and FCC review, it does not accord this same rights to Critical Infrastructure Industries, even if those these entities require a coordinated relocation in order to preserve the ability intercommunicate during emergencies. *Consensus Plan Supplement* at 30 n.50, App. C-22, 22 n.37, 29 nn.48-49.

[110] This delay could also result in the cancellation of the incumbent's license. Under the proposed rules, the FCC would cancel the license of any incumbent in Regions 1-14 that does

The accelerated relocation schedules in the Consensus Plan would also create problems concerning construction requirements and equipment acquisition.[112] These unrealistic periods conflict with the Part 90 rules allowing a minimum of one year for the construction of a license and permitting utilities to construct their systems over the course of five years.[113] They also increase the likelihood that equipment will not be available to complete the relocation in time.

A complete relocation in the stated time period would be utterly infeasible for Cinergy. Cinergy currently operates approximately 1,500 radio units and 85 base stations over a 25,000 square mile area. Because none of these radio units or base stations are programmable over the air, Cinergy must visit each and every location, a process that would require a minimum of two years. If Cinergy had to relocate under the proposed timetable, it would lose the capability to operate on a vast number of its mobile units for an uncertain period of time. This inability to communicate would have a disastrous effect on public safety during emergencies.

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not execute an agreement within 13 months of the *Report and Order*, unless engaged in arbitration or and FCC administrative process. *Id.* at 24. Without the right to initiate negotiations, incumbent licensees could not protect themselves against such a cancellation. The proposed rules require these negotiations to begin within four months of the *Report and Order*, last up to nine months, and end within thirteen months. If Nextel were to delay the commencement of the negotiations until the fourth month after the *Report and Order*, it could extend the negotiations until month thirteen, leaving incumbent licensees no time to initiate arbitration before the automatic cancellation of their licenses.

[111] 47 C.F.R. §§ 90.699; 101.73.

[112] The proposed rules establish accelerated relocation schedules, requiring smaller site-based licensees in Regions 1-14 to relocate within six months of the license grant and EA and large regional licensees to relocate within eight months, subject to potential license cancellation for failure to meet the deadline. *Consensus Plan Supplement* at 24, App. C-18.

[113] 47 C.F.R. §90.629.

D. The Consensus Plan Improperly Discriminates Against Critical Infrastructure Industry Licensees

The FCC should not adopt an 800 MHz realignment proposal that distinguishes between Public Safety and Critical Infrastructure Industries. Under the proposed rules, however, Public Safety licensees would have certain advantages not offered to Critical Infrastructure Industries. For example, Public Safety licensees would receive the following benefits: (1) funding to relocate out of the Guard Band (and the ability to relocate without RCC permission);[114] (2) the right to license spectrum vacated by Nextel during the proposed licensing freezes, including spectrum in the Business and I/LT Pools;[115] (3) no binding arbitration requirement;[116] (4) the right to have a Public Safety frequency coordinator review their application;[117] (5) an extension of time to complete relocations;[118] (6) a guarantee that relocation would not reduce coverage or increase interference potential;[119] (7) protection from interference during the realignment;[120] and (8) NPSPAC licensees would not have to relocate until each incumbent licensee in their planning region has executed a relocation agreement.[121]

The Consensus Plan should provide Critical Infrastructure Industries with the same rights and protections as Public Safety licensees under any 800 MHz realignment. These entities

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[114] *Consensus Plan Supplement* at 10 n.14.

[115] *Id.* at 12, App. C-21.

[116] *Id.* at 22, 29.

[117] *Id.* at 23.

[118] *Id.* at 30 n.50, App. C-22.

[119] *Id.* at 23.

[120] *Id.* at App. F-1.

[121] *Id.* at App. C-30.

already receive similar treatment under the Communications Act[122] and use their communications systems to perform similar functions.[123]

In addition, Public Safety and Critical Infrastructure Industry entities must possess the ability to intercommunicate during emergencies. Intercommunication is crucial between Cinergy and the approximately four hundred different Public Safety entities in its service area. For example, fire departments will not begin to inundate a burning building until they have spoken to a Cinergy representative to confirm that an electrical current no longer flows into that building. Similarly, rescue personnel will contact a Cinergy representative before approaching victims in accidents involving downed power lines. To ensure instantaneous communications during these

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[122] 47 U.S.C. § 309(j)(2) (defining "public safety radio services" to include *private internal radio services used by non-government entities*); House Conf. Rep. No. 105-217, at 572 (1997), *reprinted in* 1997 U.S.C.C.A.N. 176, 192 (stating that section 309(j)(2) covers "'private internal radio services' used by *utilities*, railroads, metropolitan transit systems, pipelines, private ambulances, and volunteer fire departments").

[123] The National Telecommunications and Information Administration Report found that utilities provide a public service and are vital components of the Nation's critical infrastructure and recommended that utilities receive preferential treatment from the FCC with respect to spectrum allocation because of their critical services. Marshall W. Ross and Jeng F. Mao, Current and Future Spectrum Use by the Energy, Water, and Railroad Industries, Response to Title II of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2001 Pub. L. 106-553, U.S. Department of Commerce, National Telecommunications and Information Administration xvii, 3-3 (Jan. 30, 2002). The trend toward enhanced protection for utilities also appears prominently in recent executive pronouncements, President George W. Bush, *Department of Homeland Security* 8, 15 (June 2002), legislation, Homeland Security Act of 2002, Pub. L. No. 107-296 § 201(5) (2002), and terror alerts, *U.S. Raises Terrorism Threat Level*, CNN.COM, Feb. 7, 2003; Barton Gellman, *Cyber-Attacks by Al Qaeda Feared: Terrorists at Threshold of Using Internet as Tool of Bloodshed, Experts Say*, WASH. POST, June 27, 2002, at A01 (quoting the chief of staff of the President' s Critical Infrastructure Protection Board as stating that "[a]n attack is a question of when, not if."); Nuclear Plants Put on Higher Alert: Intelligence Did Not Specify Threat, Spokeswoman Says, ASSOC. PRESS, May 25, 2002; Robert Charles, *Priority Required for Protecting Utilities*, WASH. TIMES, Mar. 4, 2002, at A17 (discussing the likelihood of utilities being "the next primary terrorist target" and the potential effects of terrorist attacks on utilities) (Counsel and Staff Director to the U.S. House National Security Subcommittee 1995-1999).

emergencies, Public Safety and critical infrastructure industries must have the same treatment in any realignment of the 800 MHz band.

E. Several Unduly Burdensome Procedural Problems Arise from the Consensus Plan

The nature of the Consensus Plan raises several unnecessarily complex procedural issues. For example, the proposed rules would appear to give the RCC the right to prepare and file license applications for non-Public Safety incumbent licensees without the licensee's direct participation.[124] The absence of licensee participation raises questions regarding its legal effect on the party purportedly bound by this document.

The Consensus Plan would further require the FCC to presume that certain filings by the RCC would advance the public interest without soliciting comment. For example, the FCC would certify the RCC's regional frequency plans without public notice and comment.[125] The proposed rules also would require the FCC to deem all relocation applications to be in the public interest, presumably including those applications that require a waiver request.[126] This attempt to foreclose public participation in the licensing process is diametrically opposed to the protections set forth in the Communications Act and the FCC's rules.[127]

Finally, the proposed rules state that the FCC will issue a new license and call sign for replacement channels, while simultaneously modifying the old license to expire upon the completion of the Phase I relocation process.[128] This procedure is questionable because it fails to

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[124] *Consensus Plan Supplement* at 22.

[125] *Id.* at App. C-17.

[126] *Id.* at App. C-4.

[127] *E.g.*, 47 U.S.C. § 309; 47 C.F.R. §§ 1.933, 1.939.

[128] *Consensus Plan Supplement* at App. C-20.

account for licensees that possess a mixture of "relocating" and "non-relocating" channels on the same license.

VII. THE PROPOSED FUNDING WOULD NOT ENSURE COMPLETION OF THE REALIGNMENT

The Consensus Plan fails to provide any assurance of the extent to which it will complete the proposed realignment of the 800 MHz band. Despite the objections of several commenters, the Consensus Plan continues to cap Nextel's liability for its interference-causing operations, entrusts the allocation of funds to Nextel's hand-picked administrator, and permits Nextel to exercise substantial control over the assets securing the fund. These loopholes in the proposed mechanism undermine any chance that the relocation will reach a successful conclusion.

A. The Consensus Plan Risks Premature Depletion of the Relocation Fund

The FCC should not permit Nextel to limit its liability for interference caused by its 800 MHz system. Although Nextel increased the cap on its funding for Public Safety from $500 million to $700 million and promised $150 million to relocate Business, I/LT, and SMR licensees,[129] the most recent manifestation of the cap does little to allay concerns expressed by Cinergy and others in earlier stages of this proceeding. In particular, the money pledged would likely still not cover the necessary relocation costs, raises questions regarding the types of costs that would be reimbursable, dodges the practical result of fund depletion, and fails to provide any legal or reasonable policy basis for the cap.

The funding provided by Nextel is insufficient to cover the costs of relocation. The Consensus Plan arbitrarily caps the funding without adequately describing the specific methodology or assumptions used to reach this result. The proposed rules also fail to provide

any justification for the separate caps for Public Safety and Private Wireless or for the amount of money deposited in each fund. In addition, the Consensus Parties' analysis was generated by the very entity responsible for funding the realignment. The Plan also fails to consider differences in regional labor rates and costs for the work. Public Safety signatories to the Plan have already expressed some hesitancy about these suspect calculations, especially concerning the number of Public Safety radios that they will need to replace.[130]

Nextel's calculations also seriously underestimate Cinergy's relocation costs. For example, Cinergy PSI operates a unique radio system that features the unusual combination of a small number of mobiles scattered around a large service area. A Motorola technician recently observed that Cinergy PSI's 120 conventional base stations over 65 sites vastly exceeded the size of the largest 12-channel conventional system he had seen previously. The proposed realignment would impose significant costs because none of these radio units or base stations are programmable over the air. Cinergy would have to program approximately 1,500 radio units and 85 base stations individually. Because these radio units and base stations are spread over a 25,000 square mile area, this programming would require a substantial amount of travel time. Thus, Nextel's simplistic cost estimates fail to account for the tremendous expenditure of resources required for such a massive project.

The Consensus Plan also raises concerns about the types of costs covered under the funding proposal. The Plan would fund "direct reasonable" costs of relocation,[131] presumably granting additional funding for incumbent licensees that outsource their relocation to subcontractors. The Plan is also unclear concerning whether it would cover the relocation costs

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[129] *Id.* at 5.

[130] *Id.* at 6.

[131] *Id.* at App. C-23.

of Nextel Partners, Inc. ("NPI"). NPI is an independent legal entity, free of any control by Nextel Communications, and is not a signatory to the Consensus Plan. Although the Consensus Plan appears to assume that NPI would relocate itself, and would otherwise perform certain duties, NPI is under no legal compulsion to participate and would presumably qualify for reimbursement, which would deplete the fund substantially.

The Plan would also grant undefined and questionable funding for administrative costs arising from the realignment. While Nextel could recover costs incurred prior to the adoption of the Plan, and would apparently have the discretion to determine those costs itself, the Plan also permits the NPSPAC Regional Planning Committees to recover reasonable operating costs from the relocation fund.[132] The funding methodology does not appear to estimate these undefined and unknowable costs or include them in its final calculation.

In addition, the Consensus Plan fails to address the practical result if the relocation is incomplete upon the depletion of the fund. With separate caps on Public Safety and Private Wireless relocations, displaced licensees could easily deplete one fund before the other. In addition, the Plan distinguishes between Phase I and Phase II funding,[133] meaning that relocating licensees could deplete the fund before clearing any given region. While the Plan may fully fund and complete Phase I relocations in a region, the money could run out before the completion of Phase II in that same region. In this situation, Nextel would occupy all the channels between 1-120 and would not have to relocate, *and thus would be co-channel to,* the NPSPAC systems in that region under Phase II. This is a real possibility and, if realignment is as critical as Nextel

[132] *Id.* at 28, App. C-23. The Plan also permits the NPSPAC Regional Planning Committees to recover reasonable operating costs from the relocation fund. *Id.* at 28. If Nextel and the NPSPAC Planning Committee may recover these funds, however, then other entities should also have the ability to recover their internal costs for reviewing and planning the realignment.

[133] *Id.* at 11.

claims, would leave many areas with a worse interference environment than before realignment, with no repercussions for Nextel.

Finally, no legal basis exists to immunize Nextel from the full extent of its liability. Nextel's claim that publicly traded companies must limit their liability in contracts is preposterous.[134] Under Nextel's purported view, two publicly traded companies could not enter into a contract because one of them would necessarily bear a theoretically unlimited amount of risk. By seeking to cap the liability for its interference-causing operations, Nextel would impose an unlimited amount of liability upon Public Safety and private wireless licensees, which include several publicly traded companies. Thus, Nextel's argument that its liability must be capped at some pre-determined amount is indefensible.

B. The Proposed Rules Governing the Administration of the Fund Provide Insufficient Protection to Incumbent Licensees

The proposed rules on the fiduciary duties of the Fund Administrator are incomprehensible because they lack detail sufficient to determine the extent and operation of the obligations. The Consensus Plan requires the stock of Nextel license-holding entities to be pledged to an escrow agent/trustee "for the benefit of the Fund Administrator" but never identifies the fiduciaries or to whom they owe a duty.[135] If such a fund is used, the rules should specify these fiduciary duties and clarify that the duties run to everyone with an interest in the

[134] *No Easy Answers for 800 MHz Re-Banding*, WIRELESS DATA NEWS at 2 (Nov. 20, 2002) (quoting Robert F. Foosaner, Senior Vice President for Regulatory Affairs, as stating that "[a]n open-ended contract from a publicly held company is nigh on impossible").

[135] *Consensus Plan Supplement* at 8.

fund. In addition, the rules would have to guarantee that the Administrator is liable for the mishandling of the fund.[136]

C. Nextel Fails to Offer Sufficient Guarantees About the Adequacy of the Relocation Fund

The structure of the relocation fund would not ensure that Nextel will meet its stated obligations to incumbent licensees. Under the proposed rules, Nextel would allegedly secure its financial obligation by creating separate corporate entities to hold the 700 MHz and 1.9 GHz licenses.[137] Although Nextel would pledge the stock of these corporations to a trustee as collateral, it would retain substantial control over the spectrum assets and could revise the amount or nature of the collateral.[138]

The proposed rules contain several loopholes that would allow Nextel to evade its funding responsibility. Although Nextel offers to "secure its ability to fund the Plan retuning costs by setting up separate corporate entities,"[139] the reason for establishing these subsidiaries is undoubtedly to immunize itself from liability when the fund covers only a fraction of the relocation costs. The Plan would also permit these Nextel subsidiaries to borrow money to fund the Plan, either from third parties or from Nextel itself, which could cause the equity value of these stocks to plummet and diminish their value as a pledged asset.

In addition, the actual value of the 700 MHz and 1.9 GHz licenses is uncertain. While the 700 MHz licenses are almost assuredly not worth the purchase price that Nextel paid before

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[136] This type of concern is especially pertinent because of the recent discovery of widespread fraud in the E-Rate program, which is itself administered by a private corporation. *Tauzin Investigates Fraud in E-Rate Program*, RCR WIRELESS NEWS (Jan. 23, 2003).

[137] *Consensus Plan Supplement* at 8.

[138] *Id.*

[139] *Id.*

the recent telecommunications industry downturn, the market has never established the value of the 1.9 GHz licenses.[140] If the licenses decline in value, or if Nextel borrows heavily at the subsidiary level, little or no equity value would remain and Nextel could simply avoid its financial obligations. These concerns are particularly relevant because the Plan grants Nextel wide latitude to decide when to release funds to the Administrator.[141]

The only way to avoid these problems is for Nextel to assume *direct responsibility* for providing money to the relocation fund. While the funding appears to be inadequate at the outset, the proposed method of securing it would further lessen the value of the fund and, accordingly, the incumbent licensees' ability to receive funding. If the FCC decides to grant any 1.9 GHz spectrum to Nextel, this grant should not occur until Nextel completes *the entire 800 MHz realignment process*. Alternatively, the FCC should impose detailed restrictions on Nextel and its proposed subsidiaries. For example, if the FCC permits Nextel's subsidiaries to hold the licenses, it should forbid them to incur any other obligations. The FCC should also require Nextel to provide certain representations on which every incumbent licensee could rely with respect to the assertion that the estimates of costs are reasonable, especially given the fact that Nextel was instrumental in calculating these estimates. Nextel should also provide additional

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[140] As explained below in Section VIII of Cinergy's Supplemental Comments, the Consensus Plan constitutes a new license application because the 1.9 GHz band confers substantially different rights and obligations on a licensee than the 700 MHz, 800 MHz, and 900 MHz bands. Because of its status as a new license, the FCC should comply with section 309(j)(1) of the Communications Act by auctioning this spectrum and depositing the proceeds in the U.S. Treasury. 47 U.S.C. § 309(j)(1). By circumventing the competitive bidding requirements for this spectrum, Nextel cheats the U.S. Treasury out of these proceeds. Nextel also obtains an anticompetitive windfall because the value of the licenses may exceed its contribution and because the existing FCC rules already require Nextel to mitigate the interference.

[141] *Id.* at 7. The Plan also fails to consider (1) how much Nextel must maintain in the fund; (2) how quickly Nextel must make investments in the fund; (3) who decides when and how much Nextel should deposit; and (4) at what point Nextel is in default, thereby triggering the sale of its

representations as the FCC deems adequate. These safeguards would increase the likelihood that the fund will retain its value.

While these safeguards are absolutely necessary, they would not protect incumbent licensees in the event that Nextel files for bankruptcy protection. In recent years, the once-strong telecommunications industry has seen seemingly invulnerable multibillion-dollar corporations slide quickly into insolvency. Because the future of the telecommunications industry continues to remain uncertain, Nextel is vulnerable to an economic downturn that would adversely affect the relocation fund.

The vagueness of the structure and corporate governance of the new entities merely exacerbates the problem. The utter lack of specificity in the Consensus Plan leaves incumbent licensees at risk that the assets pledged as security for the relocation will fall within Nextel's bankruptcy estate and would no longer secure the relocation obligations.[142] The only way to protect innocent licensees against this risk is to require Nextel to fund the entire relocation in cash or the equivalent of cash prior to the commencement of any realignment.

VIII. THE CONSENSUS PLAN TRANSFORMED THIS RULEMAKING PROCEEDING INTO A LICENSING PROCEEDING THAT REQUIRES ADDITIONAL PROCEDURAL SAFEGUARDS

The FCC should reclassify this rulemaking as a licensing proceeding because Nextel's demand for 10 MHz of nationwide, contiguous 1.9 GHz spectrum essentially constitutes an application for a new license. That is, Nextel has formally requested the FCC to issue it a new

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pledged collateral. These unanswered questions provide Nextel with further opportunities to evade its financial obligations.

[142] 11 U.S.C. § 541(a)(1) (1993); *In re Labrum & Doak, LLP*, 227 B.R. 391 (Bankr. E.D. Pa. 1998) (citing In re Anderson, 128 B.R. 850, 853 (Bankr. D.R.I. 1991) ("every conceivable interest in property, future, nonpossessory, contingent, speculative, and derivative is within the reach of section 541").

license in the 1.9 GHz band, subject to certain conditions that Nextel is willing to accept, such as the "voluntary" payment of $850 million. Nextel's proposal is not in the nature of mere "comments" in a rulemaking proceeding because it has stated that, unless the 1.9 GHz license is granted without any conditions materially different from those it has proposed, it will withdraw its offer (*i.e.*, application). Although Nextel characterizes this demand as merely one for license modification under section 316 of the Communications Act,[143] the FCC has not traditionally treated requests for completely different spectrum as modifications. In either case, the Consensus Parties, by their "all-or-nothing" proposal, have turned this into a contested licensing proceeding.

In the context of section 309(j)(1) of the Communications Act, for example, courts have distinguished between new licenses and modified licenses by examining whether the FCC employed a new licensing scheme that conveyed "a different sets of rights and obligations for the licensee."[144] These rights and obligations could include different coverage areas, more relaxed construction requirements, and the power to relocate incumbent licensees involuntarily.[145]

Although these differences would warrant classification of the Consensus Plan as a new license application, much less is necessary to meet this standard. In *Benkelman Telephone Co. v. FCC*,[146] the D.C. Circuit held that the FCC reasonably treated modification applications as "initial" applications with respect to a geographic overlay auction for paging licenses.[147] The petitioners challenged the FCC's decision to require incumbent paging licensees to participate in

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[143] Comments of Nextel Communications, Inc., WT Docket No. 02-55 59 (May 6, 2002).

[144] *Fresno Mobile Radio v. FCC*, 165 F.3d 965, 970 (D.C. Cir. 1999); *see Benkelman Telephone Co. v. FCC*, 220 F.3d 601, 605 (D.C. Cir. 2000).

[145] *Fresno Mobile Radio*, 165 F.3d at 970-71.

[146] 220 F.3d 601 (D.C. Cir. 2000).

[147] *Id.* at 605.

competitive bidding in order to modify their licenses.[148] The court observed that the modification applications would qualify as "new" if the "newly issued license [would] differ in some significant way from the license it displaces."[149] Although the paging licenses would perform the same service, use the same spectrum, and comply with the same construction requirements as before, the court found that the transition from site-specific to geographic licensing was enough of a "fundamental alteration" of the band to characterize these modification applications as new licenses.[150]

The proposed modification of Nextel's existing 700 MHz, 800 MHz, and 900 MHz licenses to include 1.9 GHz spectrum would constitute an application for a new license because the 1.9 GHz band would "involv[e] a different set of rights and obligations."[151] Specifically, the 1.9 GHz band would feature a different coverage area, providing Nextel with 10 MHz of contiguous, *nationwide* spectrum in place of its scattered site-specific and Economic Area allocations of 700 MHz, 800 MHz, and 900 MHz spectrum. In addition, different technical and operational rules would undoubtedly apply to this spectrum, presumably including extension of the construction requirements for Nextel's existing spectrum. Nextel would also have the right to relocate involuntarily the incumbent licensees in the 1.9 GHz band. A 1.9 GHz band license would thus "differ in [a] . . . significant way from the license[s] it displace[s]" and would convert the Consensus Plan into a new license application.[152] Moreover, Nextel has not requested the mere change of its 700 MHz, 800 MHz, or 900 MHz frequencies to 1.9 GHz. Nextel has instead

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[148] *Id.* at 604.

[149] *Id.* at 605.

[150] *Id.*

[151] *Fresno Mobile Radio*, 165 F.3d at 970.

[152] *Benkelman Telephone*, 220 F.3d at 605.

demanded that it immediately have the right to operate at 1.9 GHz and will cancel its other licenses only over an extended period of time, *i.e.*, up to four years in the case of its 800 MHz and 900 MHz licenses.

Because Nextel's "all-or-nothing" demand for 1.9 GHz spectrum would qualify as a license application, the Consensus Plan triggers the need for additional procedural safeguards. To preserve the rights of interested parties, the FCC should employ its authority under section 309(e) of the Communications Act to designate the Consensus Plan for hearing.[153] In conjunction with the opposition to Nextel's proposal and this reclassification, the FCC should immediately prohibit all *ex parte* communications on the Consensus Plan and should not engage in any further *ex parte* discussions or "negotiations" with the Consensus Parties over the conditions under which Nextel might be willing to modify its proposal.[154]

IX. CONCLUSION

In conclusion, the FCC should not rush to adopt an imperfect and convoluted 800 MHz realignment proposal that would adversely affect incumbent licensees without resolving the interference problem. While protecting the special interests of certain unrepresentative signatories, the Consensus Plan introduces several questionable measures that impose significant burdens on rule-compliant licensees. Despite Nextel's ubiquitous interference-causing operations, it would not have to suffer the technical restrictions, licensing freezes, or diminished interference protection imposed upon incumbent licensees. The Consensus Plan also incorporates several proposals that lack any basis in law, such as the RCC, and fails to ensure the completion of the proposed realignment. Thus, the FCC should defy the Consensus Parties'

[153] 47 U.S.C. § 309(e).

[154] 47 C.F.R. §1.1208.

ultimatum and reject the Consensus Plan in its entirety. In its place, the FCC should pursue a technical and market-based approach that protects innocent incumbent licensees and is more consistent with existing precedent.

WHEREFORE, THE PREMISES CONSIDERED, Cinergy Corporation respectfully requests that the FCC consider these Supplemental Comments and proceed in a manner consistent with the views expressed herein.

Respectfully submitted,

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APPENDIX A

Interference Resolution Procedures

Suggested License Conditions and Rule Changes	Discussion of Suggested License Conditions and Rule Changes
I. Interference from Low-Site Digital Transmitters A. The licensee of any system in the 806-824/851-869 MHz band that installs a digital transmitter with an antenna height less than 200 feet (60.96 meters) AGL shall provide the Commission and the frequency coordinator(s) for the 800 MHz band with the following information within 30 days after installation: 1. Licensee Name; 2. Licensee Point of Contact Name, Address, and Telephone Number 3. Geographic coordinates of all antenna structures on which it has installed transmitting antennas less than 200 feet (60.96 meters) AGL; and 4. Certification that the licensee has performed an engineering analysis pursuant to generally accepted industry practices, by which it has determined that its operations, either alone or in conjunction with systems of other licensees operating in close proximity, will not cause co-channel, adjacent channel, or intermodulation interference to other licensees in the 806-824/851-869 MHz band	*Irrespective of whether the band is realigned according to the program outlined above, the rules should provide that licensees of low-site digital transmitters have an obligation to cooperate in avoiding and mitigating interference to other licensees. This obligation extends across the entire 806-824/851-869 MHz band, and would include Nextel's post-realignment operations in the 816-824/861-869 MHz band. The primary enforcement tool is the creation of a database, to be maintained by the Commission and the coordinators, of the geographic locations of all low-site digital transmitters. Since this database would only be used to resolve interference complaints, it only needs basic information regarding station location and point-of-contact information for the licensees. Licensees of low-site digital systems would also be required to analyze the potential for interference to other systems with service areas in the vicinity of the low-site digital transmitter. Interference studies need not be filed with the Commission, but must be produced upon Commission request.*

with service areas that overlap a 5,000 foot radius around the digital transmitter site. Documentation supporting this certification need not be filed with the Commission but must be made available to the Commission upon request. Licensees are responsible for the continuing accuracy of the information included in this notice.	
B. If the licensee of a system in the 806-824/851-869 MHz band reasonably believes, based on generally accepted engineering analysis, that it is experiencing interference from a system low-site digital system at a specific location or locations, the licensee may serve written notice of interference on the digital licensee(s) having facilities within 5,000 feet of the area(s) of interference.	*A licensee experiencing interference could initiate interference resolution procedures by serving notice on licensees of nearby low-site digital transmitters. The requirements for notification and mitigation are largely modeled on the procedures recommended by Nextel and the other "Consensus Parties."*
1. Initial notification: A licensee receiving interference seeking the participation of low-site digital licensees in evaluating an alleged interference occurrence shall post a standard interference complaint to an e-mail address operated jointly by the licensees of low-site digital systems. The complaint shall contain (a) the specific geographical location where the interference is occurring in terms of latitude and longitude, (b) the FCC license information for the offended party, and (c) the offended party's point of contact ("POC") for technical information.	
2. Initial response: All operators receiving notice of the complaint shall respond to the complaint within two business days and shall	

confirm whether they have equipment operating within 5000 feet of the location of the alleged interference. The equipment may be either cell site equipment or repeaters. 3. On-site analysis. The complaining entity's technical POC shall contact the potential contributors and arrange for an on-site analysis to take place within five business days (or later, at the discretion of the complaining entity). All potential contributors to the interference shall support the analysis effort. On the agreed-on day the complaining entity's technical POC and the POCs from the potential contributors shall conduct an analysis of the interference. 4. Mitigation steps. When the analysis shows that one or more of the potential contributors are interfering with the system in question, the contributors to the interference shall correct the interference per industry-standard mitigation techniques. If the analysis shows that a suspected contributor is not part of an interference problem, the suspected contributor will be relieved of responsibility for correcting interference at that site. If the analysis shows that a suspected contributor is causing interference, that entity shall contribute to resolving the interference. The resolution of the interference shall be documented and copies provided to each contributor and the complaining licensee.	

5. Active management. If mitigation of interference at a site requires that contributors make changes which are easily reversed (e.g., changing of transmitter frequencies to avoid intermodulation ("IM") product formation on a particular frequency, or a reduction in on-street power), then the contributor making the change shall coordinate both with the other contributors and the complaining entity before making further changes to the site. 6. Interference from equipment not belonging to CMRS providers. If the interference is found to be caused by something other than the equipment belonging to a CMRS provider (e.g., a bi-directional amplifier ("BDA") installed by a third party), the owner of the equipment shall be responsible for mitigating the interference. 7. The licensee alleging interference shall have a duty to cooperate in the implementation of the most cost-effective solution. 8. If an agreement between the parties is not reached within 60 calendar days after receipt of the written notice of interference, either party may submit the matter to the FCC for resolution.	

APPENDIX B

Rebanding Transition Procedures

There is little direct evidence that a realignment of the 800 MHz band as proposed by Nextel and the Private Wireless Coalition will sufficiently mitigate interference to justify the massive cost and disruption that would be occasioned thereby. However, even if the FCC could find that the benefits of such rebanding will outweigh the costs, there is no reason why relocations could not be accomplished using market-based transition procedures comparable to those previously used by the FCC. The following suggested rule changes and license conditions are offered in order to illustrate that it would be possible to initiate a market-driven rebanding process that could be adopted within the scope of the FCC's authority, would not be dependent on "voluntary" commitments by any parties, and would not require a cumbersome administrative bureaucracy. These suggested license conditions and rule changes should not be construed as support for rebanding generally.

Suggested License Conditions and Rule Changes	**Discussion of Suggested License Conditions and Rule Changes**
I. **Definitions**. As used herein- A. The "Report and Order" is the Report and Order adopted in WT Docket No. 02-55. B. An "incumbent system" is a radio system licensed to any entity other than Nextel or its affiliates in the 806-824/851-869 MHz band as of the effective date of the Report and Order in WT Docket No. 02-55.	
II. **Condition on Nextel's Licenses**. All licenses in the 806-821/851-866 MHz band held by Nextel Communications, Inc., as well as its affiliates, subsidiaries, and other entities substantially controlled by or under common control with Nextel (collectively referred to herein as "Nextel"), as of the effective date of the Report and Order, shall be subject to the following conditions: A. Relocation of Incumbent Systems. Nextel shall, at its own expense, and subject to the comparability standards	*The Report and Order should impose certain conditions on Nextel's licenses requiring it to relocate incumbents in the 800 MHz band such that NPSPAC channels would be relocated to designated replacement spectrum (e.g. the 806-809/851-854 MHz band), and Nextel would relocate from below 816/861 MHz to spectrum above 816/861 MHz, including the former NPSPAC channels. Nextel would have certain rights to relocate incumbents, but would also be subject to certain obligations to protect incumbents' interests*

of Section 90.699(d)(1)-(4): 1. Relocate all incumbent systems from the 806-809/851-854 MHz band to equivalent spectrum in the 809-816/854-861 MHz band; 2. Relocate all incumbent systems from the 821-824/866-869 MHz band to equivalent spectrum in the 806-809/851-854 MHz band pursuant to a channel plan that maps on a one-for-one basis each channel in a Public Safety Regional Plan to a new channel in the 806-809/851-854 MHz band while maintaining channel spacing as provided in the Regional Plan; and 3. Relocate an incumbent system from the 814-816/859-861 MHz band to equivalent spectrum in 809-814/854-859 MHz band upon written request of the incumbent licensee made within 12 months after the effective date of the Report and Order. In any event, a licensee relocating to or electing to remain in the 814-816/859-861 MHz band shall be entitled to the same levels of interference protection as any other licensee in the 806-816/851-861 MHz band. B. <u>Guaranteed Payment.</u> No incumbent system licensee is required to relocate unless all estimated relocation costs are paid in advance by Nextel, or unless the parties agree otherwise. 1. To guarantee adequate funding for this process, Nextel shall place in an irrevocable escrow account sufficient funds to cover the projected relocation costs. The Commission may authorize	*throughout the relocation process.* *Nextel would be required to relocate incumbents from the former General Category channels and the former NPSPAC channels, as well as any licensees in the 814-816/859-861 MHz "guard band" that request relocation during the first year after the rules are adopted.* *To ensure that no one is forced to relocate without funding, all relocation expenses would be paid in advance unless the parties agree otherwise. Because a partial realignment of the 800 MHz band could lead to worse interference conditions than exist today, Nextel should be required to establish an escrow account to guarantee its complete performance of the required relocations.*

adjustments to the escrow amount to ensure that the escrow account contains sufficient funds to cover the reasonably projected costs of relocation. In the event of bankruptcy, insolvency, or other inability or unwillingness of Nextel to complete the necessary relocations, funds from this escrow may be used to reimburse incumbent licensees for all reasonable steps to complete the transition. The escrow agreement shall provide for the return of funds to Nextel only on order of the Commission.	
C. Upper Band Replacement Spectrum. Nextel shall be authorized to commence operation in the 821-824/866-869 MHz band in a given Public Safety Planning Region only upon certification to the Commission that it has entered Relocation Agreements with respect to all incumbent systems in that Region as provided in paragraphs A.1. through A.3. above.	*Nextel's modified license would provide it with replacement spectrum in the former NPSPAC channels at 821-824/866-869 MHz. However, it could not access this spectrum in a Public Safety Planning Region until it has entered agreements to relocate all incumbent systems in that region.*
D. Cancellation of Other Licenses.	
1. Nextel's authorization for channels in the 806-816/851-861 MHz band within a given Public Safety Planning Region shall cancel automatically, and Nextel shall cease operations on all such channels, within eighteen (18) months after it has entered agreements for the relocation of incumbent Public Safety systems in that Region from the 821-824/866-869 MHz band as required in paragraph A.2. above.	*To ensure that Nextel promptly exits the spectrum below 816/861 MHz, it would lose the right to operate below 816/861 MHz 18 months after it has entered agreements to relocate Public Safety systems out of the former NPSPAC band.*
2. Neither Nextel nor any of its affiliates, subsidiaries, and other	

entities substantially controlled by or under common control with Nextel shall be eligible to acquire, directly or indirectly, any licenses for channels in the 806-816/851-861 MHz band upon the effective date of the Report and Order in WT Docket No. 02-55, except to the extent channels are exchanged with incumbent systems for purposes of the relocations described in paragraphs A.1. through A.3. above.	*In recognition of the contiguous nationwide spectrum it would obtain as a result of this process, neither Nextel nor its affiliates would be permitted to re-license channels below 816/861 MHz.*
III. Availability of Vacated Channels.	
A. Channels in the 809-816/854-861 MHz band vacated by Nextel will become available for routine licensing to other entities in a particular Public Safety Region only after all of the incumbent systems in the 806-809/851-854 MHz and 821-824/866-869 MHz bands, as well as incumbent systems in the 814-816/859-861 MHz band electing relocation, have been relocated in that Region.	*Although Nextel would not have authority to operate on these channels once its licenses cancel, these vacated channels could be used only for relocation purposes until the Commission determines the relocation process has been completed in a particular NPSPAC region.*
B. Upon relocation of all incumbent systems from these bands in a particular Public Safety Region, the Commission will issue a Public Notice announcing the completion of the relocation process for that Region, and will make any remaining channels vacated by Nextel in the 809-816/854-861 MHz band in that Region available for licensing to other entities eligible for Public Safety, Business, or Industrial/Land Transportation licenses.	

IV. Relocation Procedures A. Relocation Period. The Relocation Period shall commence on the effective date of the Report and Order in WT Docket No. 02-55. B. Relocation Notice. Nextel may commence the relocation of an incumbent system at any time during the Relocation Period by providing the licensee with written notice of an intent to relocate. C. Mandatory Negotiations. Following receipt of notice, the parties shall negotiate in good faith to develop a Relocation Plan. 1. Under the Relocation Plan, Nextel shall, at its own expense, provide the incumbent with equivalent replacement spectrum as specified in Section II.A. above, and shall assume liability for or reimburse the incumbent licensee for all costs, including legitimate and prudent transaction expenses and the licensee's internal resources devoted to the relocation process, and costs associated with coordination, engineering, and facilities that may be necessary to provide the incumbent licensee with performance and capacity that is comparable to what was provided by the incumbent's existing system prior to the relocation, using the same factors to assess comparability as defined in Section 90.699(d)(1)-(4) of the Commission's Rules. Authorization for a replacement channel shall contain no additional restrictions or encumbrances beyond those that were applicable immediately prior to the effective	*The relocation rules are modeled after the relocation rules previously used to clear the 2 GHz band for PCS and the Upper 200 SMR channels, and depend on the balancing of rights and obligations between the incumbents and the "new" licensee initiating the relocations. However, since the intent of this process would be to promptly initiate action to mitigate interference, there would be no "voluntary" negotiation period; i.e., parties would be under an obligation to negotiate in good faith.* *Comparability of replacement systems would be gauged by the existing definition of comparability in Section 90.699. Moreover, replacement channels would have to provide the incumbent licensee with at least the same opportunity to operate and modify facilities as with its existing license. Thus, for example, an EA licensee in the 806-809/851-854 MHz band should receive an EA-based license that contains no encumbrances or technical restrictions that differ from the encumbrances or conditions (if any) that exist with respect to the incumbent's license immediately prior to the effective date of the Report and Order.*

date of the Report and Order to the channel to be vacated by the incumbent licensee.	
2. The replacement channels for incumbent systems in the 806-809/851-854 MHz band shall consist of designated replacement channels formerly licensed to Nextel. These may include channels from the 809-816/854-861 or 816-821/861-866 MHz band.	*While it has been assumed that Nextel has sufficient channels to be vacated for replacement purposes, if those channels are insufficient in any market,it would be required to provide replacement channels from its "Upper 200" SMR channels.*
3. The Relocation Plan shall establish timeframes for relocation intended to minimize disruption of the incumbent's operations. For this purpose, three years shall be presumed to be a reasonable period of time to relocate a system that was licensed for, or would qualify for, extended implementation under Section 90.629(a). Unless the parties specifically agree otherwise, the Relocation Plan shall provide for each mobile and portable to be re-tuned only once.	*A key part of any Relocation Plan is the timeframe within which the incumbent will relocate, giving due regard to the size of the system and the need to avoid disruption to ongoing operations.*
D. Good Faith. Once mandatory negotiations have begun, a party may not refuse to negotiate and all parties are required to negotiate in good faith. Good faith requires each party to provide information to the other that is reasonably necessary to facilitate the relocation process. In evaluating claims that a party has not negotiated in good faith, the FCC will consider, *inter alia*, the following factors:	*The requirement to negotiate in good faith is modeled after the mandatory negotiation rules for the 2 GHz microwave band. These rules place an emphasis on a negotiated solution, but provide safeguards against overreaching by either party, with allowance for complaints to the FCC should one party believe the other party is not negotiating in good faith.*
1. Whether Nextel has made a bona fide offer to relocate the incumbent system to comparable facilities as defined in Section	

90.699(d); 2. If the incumbent licensee has demanded a premium, the type of premium requested (e.g., whether the premium is directly related to relocation, and whether the value of the premium as compared to the cost of providing comparable facilities is disproportionate (i.e., whether there is a lack of proportion or relation between the two); 3. What steps the parties have taken to determine the actual cost of relocation to comparable facilities; 4. Whether either party has withheld information requested by the other party that is necessary to estimate relocation costs or to facilitate the relocation process. E. Any party alleging a violation of the good faith requirement must attach an independent estimate of the relocation costs in question to any documentation filed with the Commission in support of its claim. An independent cost estimate must include a specification for the comparable facility and a statement of the costs associated with providing that facility to the incumbent licensee. F. Involuntary Relocation Procedures. If no agreement is reached during the mandatory negotiation period, Nextel may request involuntary relocation of the incumbent's system. In such a situation, Nextel must: 1. Guarantee payment of relocation costs, including all engineering, equipment, site and FCC fees, as well as any legitimate and prudent	*If the parties cannot reach an agreement within the one-year mandatory negotiation period, Nextel could initiate involuntary relocation procedures by guaranteeing to pay all relocation costs, providing for all steps necessary to complete the transition, and ensure that the replacement facilities meet the standards for comparability.*

transaction expenses incurred by the incumbent licensee that are directly attributable to an involuntary relocation. 2. Provide for the completion of all activities necessary for implementing the replacement facilities, including engineering and cost analysis of the relocation procedure, and obtaining, on the incumbents' behalf, new frequencies and frequency coordination; and 3. Ensure that the replacement system is built and tested for comparability with the existing 800 MHz system.	

CERTIFICATE OF SERVICE

I, Christine S. Biso, do hereby certify that on this 10th day of February 2003, I caused a copy of the foregoing "Supplemental Comments of Cinergy Corporation" to be hand-delivered to each of the following:

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